ADOPTING THE FAMILY TAXABLE UNIT

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In recent years, scholars have suggested that population stability plays an important role in countries' economic health. In light of that assertion, and with an eye toward declining birthrates abroad, this Article asks how the United States, through tax policy, might aid maintenance of a stable population level. Specifically, the Article recommends use of the family taxable unit as a means of reducing the effects of time and wage pressure on larger families. Use of the family taxable unit would, unlike some other tax provisions, bring conceptual coherence to the tax treatment of families while remaining neutral with regard to the labor market participation of secondary earners.

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I. INTRODUCTION

1. A Birthrate Backgrounder

Demographers have sounded the alarm. The world has embarked upon the greatest demographic change in human history.[1] As a consequence, many European nations will experience population decline in the early part of this century.[2] The total fertility rate in Russia, for instance, is only 1.14 children per woman, and in Japan, it is only 1.3 children per woman.[3] These numbers are significant not only because they indicate a current failure to replace population but also because mothers of the next generation will come from the current one. This decade's thinned cohort of potential mothers could cause some countries to experience exponential population decline in subsequent generations.[4]

Declining birthrates are cause for economic concern. Capitalism has flourished only in conjunction with population growth, and it is now flagging in Europe and Japan where the population has become stagnant.[5] The strong correlation observed between population growth and economic growth suggests that nations whose numbers dwindle must look for novel ways to sustain their economies.[6] For instance, one report estimates that social benefits promised by the world's developed nations to retirees "cannot be measured—and are at least in the

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1. BEN J. WATTENBERG, FEWER: HOW THE NEW DEMOGRAPHY OF DEPOPULATION WILL SHAPE OUR FUTURE 1 *2004).

2. LAURENCE J. KOTLIKOFF & SCOTT BURNS, THE COMING GENERATIONAL STORM: WHAT YOU NEED TO KNOW ABOUT AMERICA'S ECONOMIC FUTURE 3 (2004).

3. WATTENBERG, *supra* note 1, at 127. Total fertility rate, roughly speaking, is the number of children per woman in a particular country. Technically, it is defined as the average number of children that a birth cohort of women would having during their lifetimes if they survived their childbearing years and had children at the age-specific birthrates applicable to the period in question. *See* U.N. DEP'T OF ECON. AND SOC. AFFAIRS, POPULATION DIV., WORLD POPULATION PROSPECTS: THE 2004 REVISION, VOL. III, at 34, U.N. Doc ST/ESA/SER.A/246 (2006), *available at* http://www.un.org/esa/population/publications/WPP2004/WPP2004_Vol3_Final/WPP2004_Analytical_Report.pdf [hereinafter UNITED NATIONS].

4. WATTENBERG, *supra* note 1, at 112.

5. PHILLIP LONGMAN, EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT 4 (2004).

6. WATTENBERG, *supra* note 1, at 116 (suggesting that pay-as-you go retirement benefits will result in economic disarray in countries facing depopulation).

quadrillions of dollars."[7] As a result, countries like Italy and Japan, where nearly half of the population will be older than age 65 by 2050, are facing significant economic challenges.[8] Absent technological advance, the failure of developed and developing nations to maintain a stable population level may decrease worldwide productivity and ultimately result in economic collapse.[9]

But what of the United States? In 2006, the country's population reached 300 million.[10] The event was widely celebrated as a counterpoint to declining birthrates in other parts of the world.[11] Nonetheless, stories about the event, when read closely, reveal its tenuousness.[12] United States population growth, as it was reported, depended not only on the birthrate of its immigrants but also on decreased mortality rates among infants and the elderly.[13] Despite the rosy picture painted by the Census Report, fertility trends in the United States, when viewed in ethnic and geographic terms, show that a significant portion of the country has already followed in Europe's footsteps.[14] The currently robust population figures can be traced to two sources: the baby boom and immigration. The baby boom was a singular event, an anomaly that reversed a 150-year decline in United States fertility rates.[15] Setting that anomaly aside, American growth

7. *Id.*

8. *Id.*

9. Technology might surprise us. It ranges from the cheerful to the macabre. For instance, robots like Honda's Asimo might stand in for workers. Or, as Stanley Kurtz has laughably suggested, a "eugenic regime" of crazed scientists might "spell the definitive end of the nuclear family" through creation of "*artificial* wombs." *See* Stanley Kurtz, *Demographics and the Culture War*, 129 POL'Y REV. 33, 44–45, (2005), *available at* http://www.hoover.org/publications/policyreview/3431156.html.

10. *The United States: 300 Million and Growing*, WALL ST. J., Oct. 21, 2006, at A7.

11. *See* Marcus Walker, *Population Control: In Estonia, Paying Women to Have Babies is Paying Off*, WALL ST. J., Oct. 20, 2006, at A1. *See also* June Kronholz, *Immigration's Latest Debate: Is U.S. Big Enough?*, WALL ST. J., July 11, 2006, at A5.

12. To put the question into perspective, consider Pittsburgh, a traditional blue-collar city. According to the Bureau of Labor and Statistics, it will lose a full tenth of its labor force over the next seven years. Eduardo Porter, *Coming Soon: The Vanishing Work Force*, N.Y. TIMES, Aug. 29, 2004, § 3, at 1, *available at* 2004 WLNR 5511490. Half of its electric workers and at least 6,500 of its nurses will reach retirement age over that period, leaving the city with a shortage of qualified laborers, but nothing so dramatic as the shortage that is expected in Japan. *Id.*

13. *See* Stephen Moore, *Supply Side: 300,000,000*, WALL ST. J., Oct. 3, 2006, at A26; *The United States: 300 Million and Growing*, *supra* note 10.

14. LONGMAN, *supra* note 5, at 16. *See also* BRADY E. HAMILTON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS: PRELIMINARY DATA FOR 2003 2 tbl. A (2004), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_09.pdf (showing that in 2003, only mothers of Hispanic ethnicity had a TFR in excess of the replacement rate, while Native American women had a TFR of 1.72, Caucasian women 1.86, Asian women 1.87, and Black women 1.87).

15. HERBERT S. KLEIN, A POPULATION HISTORY OF THE UNITED STATES 175 (2004).

comes principally from immigration.[16] Today's fertility rates among native-born women (including first generation Americans) are substantially below even the lowest levels of the Great Depression.[17]

Whether America's role as the world's melting pot will keep it safe from demographic concerns is far from clear. Among immigrants, women of Hispanic origin have the most children, and of those, women of Mexican origin are likely to have the largest families.[18] But the total fertility rate (TFR) in Mexico itself has fallen to the bare replacement rate as women have become more educated.[19] Demographers have observed similar trends in other developing countries.[20] As the fertility rate drops in immigrant-sending nations, America can expect its newest residents to have fewer children.[21] At the same time, the number of United States retirees is expected to double by 2030, but the entry of new workers will not keep pace.[22]

2. *A Demographic Dilemma*

Ben Wattenberg has called the phenomenon described above as "The Graybe Boom."[23] Laurence Kotlikoff and Scott Burns have called it "the greatest demographic change in human history. In less than a century, the United States will move from being 'forever young' to 'forever old.'"[24] The retirement of the baby boom generation over the next thirty years marks the turning point.[25] While there were only 35.5

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16. WATTENBERG, *supra* note 1, at 121. This is a financial boon, because the average immigrant contributes $80,000 more in taxes than she receives in government services over the course of a lifetime. *Id.* at 192. *See also The United States: 300 Million and Growing*, *supra* note 10 (stating that "Jeffrey Passell, a demographer from the Pew Hispanic Center estimates that immigrants and their U.S.-born offspring made up 55% of the last 100 million people in the U.S."); Kronholz, *supra* note 11 (stating that immigration is expected to account for almost all public school growth over the next decade and that the United States fertility rate "has been falling for decades and now is less than two. But Hispanics, who account for more than half of all immigrants and 80% of illegal immigrants, average almost three babies per woman. As a result, 20% of children under age five in the U.S. are Hispanic." *Id.*

17. KLEIN, *supra* note 15, at 236; LONGMAN, *supra* note 5, at 16. For more information on the decline in birthrates during the Great Depression, and the positive effect of subsequent economic stability, see Price V. Fishback, Michael R. Haines & Shawn Kantor, *Births, Deaths, and New Deal Relief During the Great Depression* (Nat'l Bureau of Econ. Research, Working Paper No. 11246, 2005), *available at* http://www.nber.org/papers/w11246.

18. WATTENBERG, *supra* note 1, at 65.

19. *Id.* at 74–75.

20. *Id.* at 155.

21. *Id.*

22. *Id.* at 6.

23. WATTENBERG, *supra* note 1, at 115.

24. KOTLIKOFF & BURNS, *supra* note 2, at 1.

25. *Id.*

million people age 65 and older in the United States in 2000, there will be 69.4 million of them in 2030.[26] In addition, life expectancy in the United States has risen to a record 77.6 years.[27] These numbers are significant because caring for elderly citizens is expensive. Individuals of age 65 and older receive eleven times more federal spending per capita than children under the age of 18.[28] Social Security and Medicare make up the bulk of these expenses.[29] In 1950, the ratio of workers to Social Security beneficiaries was over 16:1.[30] In 2030, it will be 2:1.[31] And by 2080, the number of elderly dependents in the United States is projected to reach 60% of the population.[32]

Authors predict that the growing ratio of retirees to workers will negatively impact the economy.[33] Increased Social Security and Medicare costs will be reflected in "higher taxes, heavy government borrowing, inflation, and interest rates that produce a negative real return."[34] Why? Daniel Shaviro has estimated that the fiscal gap is $73 trillion but that only a small fraction of that gap represents current government borrowing.[35] This may mean that Americans can expect

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26. *Id.* at 6. This phenomenon is by no means confined to the United States. According to the United Nations, the number of people over the age of sixty-five will triple from 476 million in 2005 to almost 1.5 billion in 2005. UNITED NATIONS, *supra* note 3, at 27.

27. *Americans' Life Expectancy Reaches a Record 77.6 Years*, ST. LOUIS POST-DISPATCH, Mar. 1, 2005, at A05, *available at* 2005 WLNR 3152041. Scientists predict that it may soon be common for people to live over 100 years. The *National Journal* notes that:

> [t]he race for the three-figure obit has already begun. This spring, a high-profile research team called LifeQuest Expedition, partly sponsored by the U.S. government, will travel to "longevity hot spots" around the world—places like Okinawa, Japan, and the Italian island of Sardinia, where unusually large numbers of people live past 100. The LifeQuest team will collect data about how these people become such "successful agers," and will report back to the American public.

William Powers, *The Immortality Race*, 37 NAT. J. 7 (2005), *available at* http://www.theatlantic.com/doc/prem/200502u/nj_powers_2005-02-15.

28. LONGMAN, *supra* note 5, at 38.

29. *Id.*

30. KOTLIKOFF & BURNS, *supra* note 2, at 4–5.

31. *Id.*

32. *Id.* at 6. This paper does not call into question the expenses themselves—over two-thirds of older Americans get at least 50% of their income from Social Security and the bulk of their health needs from Medicare. *Id.* at 203. Rather, it focuses on a family-friendly measure that could mitigate the difficulty of meeting these needs by, if stated crassly, contributing to an increase in the number of available taxpayers.

33. *Id.* at 8; LONGMAN, *supra* note 5, at 18. In fact, Kotlikoff and Burns have gone so far as to say that "unless we act soon, the Greatest Generation will be the last to leave its children and grandchildren a better country." KOTLIKOFF & BURNS, *supra* note 2, at 224. *See also* UNITED NATIONS, *supra* note 3, at 26 (noting that changes in population age may translate into economic changes).

34. KOTLIKOFF & BURNS, *supra* note 2, at 190.

35. Daniel N. Shaviro, *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes*

tens of trillions of dollars of future taxes and future borrowing. Furthermore, economic growth cannot close the gap.[36] Both taxes and government outlays are pegged to growth, so as tax revenues increase, so do outlays.[37]

How will the distribution of this burden play out for taxpayers? Jagadeesh Gokhale and Kent Smetters, in a report originally commissioned for the President's 2004 budget, formulated a "menu of pain" aimed at reducing the fiscal gap by $45 trillion.[38] To achieve the goal, they calculated that the government could raise federal income taxes by 69%; increase payroll taxes by 95%; cut federal spending by 106%; or cut Social Security and Medicare by 45%.[39] Taken separately, or mixed and matched, none of these options is particularly appealing. Each reveals the seriousness of the problem facing the United States.

Viewed in toto, the predictions of demographers and economists foreshadow the potential resurrection of one of the more regrettable incidents in our economic archive. Dare I invoke stagflation? Demographers predict that low birthrates and high retirement rates will cause the workforce to shrink.[40] Economists predict that the shrinking work force will slow the economy.[41] Demographers predict that the number of retirees will grow to outweigh the number of workers.[42] Economists predict that the shortage of workers will force the government to issue staggering debt.[43] In order to pay the debt, it will be forced to raise taxes and inflate currency.[44] The combination of high taxes, high interest rates, and a sluggish economy is the classic formulation for stagflation. And while it proved impermanent in the 1970s, stagflation corresponded to the lowest overall fertility rate in our nation's history: the baby bust.[45] And but for the baby bust, the country

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in the Face of an Enormous Fiscal Gap, 45 B.C. L. REV. 1285, 1298 (2004).

36. *Id.* at 1302 (noting that the fiscal gap "appears to be growth-proof because various expenditure programs, no less than taxes, are pegged to [gross domestic product] over the long run").

37. *Id.*

38. KOTLIKOFF & BURNS, *supra* note 2, at 65 (citing JAGADEESH GOKHALE & KENT SMETTERS, FISCAL AND GENERATIONAL IMBALANCES: NEW BUDGET MEASURES FOR NEW BUDGET PRIORITIES (2003), *available at* http://www.clevelandfed.org/Research/PolicyDis/no5dec03.pdf). *See also* Jagadeesh Gokhale & Kent Smetters, *Measuring Social Security's Financial Problems* (Nat'l Bureau of Econ. Research, Working Paper No. 11060, 2005), *available at* http://www.nber.org/papers/w11060.

39. KOTLIKOFF & BURNS, *supra* note 2, at 65.

40. *Id.* at 6.

41. LONGMAN, *supra* note 5, at 4.

42. KOTLIKOFF & BURNS, *supra* note 2, at 1.

43. *Id.* at 190.

44. LONGMAN, *supra* note 5, at 127–128.

45. *See generally* KOTLIKOFF & BURNS, *supra* note 2; LONGMAN, *supra* note 5; WATTENBERG, *supra* note 1.

might not be faced with the prospect of stagflation's second coming.

That long-feared apparition brings the importance of population stability to the fore. Although stabilization of the United States workforce-retiree ratio could occur without government intervention over several generations, those generations, according to some authors, would face high tax rates, delayed retirement, and severe inflation, which are not ideal conditions for demographic recovery.[46] It would be preferable to avoid such a population shock if possible. The United States should, therefore, revisit the role of families in the maintenance of a stable population. Toward that end, this Article examines the treatment of families by the Internal Revenue Code and concludes that while the Code provides familial status benefits in a number of areas, it covers only half of the necessary distance.

3. *A preview and proposal*

In order to determine the role of taxation in maintenance of a stable population, it is necessary to first consider possible causes of declining birthrates. Part II of the Article explores this phenomenon. It observes that, in developed nations, womens' increased education and work force participation are strongly correlated to delayed birth of the first child and to smaller overall family size. Both empirical data and common sense suggest such a result. Education and employment require large investments of time and money, resources that are critical to would-be mothers. Part II concludes that, as a result of time pressure and financial pressure, there necessarily exists a group of women who would like to have a first or additional child but who feel that they are unable to do so because they lack the necessary resources.

Part III of this Article asks whether the tax code could aid in the maintenance of a stable population level by reducing or removing the disincentives that prevent women in this group from having additional children. To make such a determination, it is first necessary to examine whether individuals are responsive to changes in the tax law. A mixed body of literature indicates that, in general, people at the margins may respond to tax changes even though others do not. Since some of the women described in this Article are in a marginal position, tax law amendments may reduce or remove disincentives that currently prevent them from adding a child to the family. Such a change would necessarily benefit families in both marginal and inframarginal positions, but the inframarginal effect, i.e., the provision of economic

46. *Id.* at 42–71.

support to families who are not considering an additional child, is seen by many as a laudable goal even absent any effect on population maintenance.

In order to recommend an amendment that would accomplish both the desirable marginal and inframarginal effects described above, it is necessary to establish the current state of the law. Part IV of this Article discusses benefits to families that are currently provided by the Internal Revenue Code. The Code considers familial status in its dispensation of credits and deductions and in its establishment of the appropriate tax rate. Despite the existence of these family-oriented provisions, the Code's approach to family taxation is fractured rather than holistic. For instance, the current provisions are not neutral with respect to the labor market decisions of secondary earners. While joint filing puts pressure on secondary earners to remain at home by taxing their wages at an artificially high rate, child care benefits implicitly express a preference for working mothers. Part V concludes that, unlike existing provisions, the family taxable unit, when offered as an elective provision, is neutral with regard to secondary earners' labor market decisions.

Accordingly, Part VI argues that the United States should permit taxpayers who elect income splitting to use the entire family, rather than the married couple, as the unit of taxation. Adopting the family taxable unit would make positive reproductive decisions tax-favored, thereby removing a portion of the financial disincentive faced by families who want, but feel that they cannot afford, additional children. Families who elect to use the provision would aggregate their income and divide it by the total number of members in the household. The resulting product would be used to calculate the family's taxable income. Under this system, larger families would benefit from lower tax rates, resulting in a net transfer of wealth from single persons and smaller families to larger ones. Part VI concludes that this transfer is justified because, in the aggregate, children produce positive externalities, the costs of which fall primarily upon their parents.

Finally, Part VII looks to France for a demonstration of how the family taxable unit might work in practice. France adopted the measure in the early twentieth century and maintains its use as one of a package of measures designed to address population concerns. The principle seems to work in practice. This Article then concludes that, aside from its potentially useful role as a population stabilizing measure, adoption of the family taxable unit is justified because it brings conceptual coherence to family taxation while increasing freedom of choice for secondary earners and families.

II. POTENTIAL CAUSES OF DECLINING BIRTHRATES

In order to assess the potential value of the family taxable unit to families that would like to have additional children but feel constrained by external pressures, we must first consider why birthrates have declined. Scholars have posited a variety of causes. In developing countries, the spread of legalized contraception and abortion has given women a reproductive choice with dramatic effect.[47] Migration from agrarian to urban settings has made children less economically desirable.[48] In addition, mass communication is changing ideas about the modern family.[49] For instance, one study in Brazil correlated a drop in birth rate from one region of the country to the next with the introduction of television.[50]

These factors are no longer a concern in the United States. Instead, American women are influenced in their child birth decisions by their education, their careers, and the economy, among other things.[51] According to the National Center for Health Statistics, a woman's educational attainment is the single best predictor of how many children she will have.[52] This observation is hardly new. From 1888 to 1900, Bryn Mawr women had a fertility rate of only 0.37 children per graduate.[53] And although those days are passed, a recent study concluded that while higher education has no effect on the number of children that women want, their pursuit of education delays childbearing.[54] That delay, in combination with factors described below,

47. WATTENBERG, *supra* note 1, at 97–98.

48. *Id.* at 94.

49. *Id.* at 102.

50. LONGMAN, *supra* note 5, at 32.

51. *See generally* LONGMAN, *supra* note 5; WATTENBERG, *supra* note 1; KOTLIKOFF & BURNS, *supra* note 2.

52. LONGMAN, *supra* note 5, at 17.

53. *Id.* at 159. According to Longman, this trend caused Theodore Roosevelt to lament the decline in fertility of "'old New England stock.'" *Id.* Longman writes:

> He attributed the trend partly to the "highly welcome emancipation of woman" but went on to explain that "this new freedom has been twisted into wrong where it has been taken to mean a relief from all those duties and obligations which, though burdensome in the extreme, women cannot expect to escape."

Id. Fortunately, a more enlightened view prevails today.

54. RUTH WESTON ET AL., AUSTRALIAN INST. OF FAMILY STUDIES, "IT'S NOT FOR LACK OF WANTING KIDS": A REPORT ON THE FERTILITY DECISION MAKING PROJECT 61 (2004), *available at* http://www.aifs.gov.au/institute/pubs/resreport11/aifsreport11.pdf (finding that women's expected family size varies significantly with employment status). *See also* Claudia Goldin, *Career and Family: College Women Look to the Past* (Nat'l Bureau of Econ. Research, Working Paper No. 5188, 1995), *available at* http://www.nber.org/papers/w5188.

necessarily limits family size.[55]

Like education, entry into the workforce may delay a woman's decision to have children.[56] The percentage of women of childbearing age in the workforce rose from 34% to 60% in the last half of the twentieth century.[57] Women's average age at the birth of their first child and the number of years between subsequent births rose steadily over the same period as a consequence.[58] However, there has been very little change in the percentage of women giving birth between 1960 and the present day.[59] In other words, like education, entry into the workforce does not affect women's desire to have a family, but it does affect what the size of that family will be. Survey data support this assertion. In a recent Gallup pole of women between the ages of 18 to 29, 42% of the participants (a substantial minority) said that families with three or more children were ideal in size.[60] Nonetheless, the data described above predict that very few of the women surveyed will have such large families and, as a correlative, that almost all of them will be employed.

Why do women delay childbirth once they have steady jobs? Work imposes two important strictures on women with families. The first is wage pressure, and the second is time pressure. The two are inextricably intertwined. For instance, if childcare for hire is expensive or limited in availability, two-earner families and single mothers must arrange for alternative care. Only one-tenth of women who work full time receive employer assistance for child care, and only one in twenty works for a firm that offers on-site or off-site care.[61] Regardless, studies indicate that the responsibility for arranging care, as well as the bulk of other domestic responsibility, falls to the mother in a two-earner household.[62]

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55. *See* WESTON, *supra* note 54, at 76 (noting that although the correlation between education and preferred family size is not statistically significant, more highly educated individuals are, in fact, less likely to be parents).

56. *Id.* at 92.

57. WATTENBERG, *supra* note 1, at 96.

58. KLEIN, *supra* note 15, at 218.

59. *Id.*

60. LONGMAN, *supra* note 5, at 85. For some women, the choice to have a smaller family may not be a conscious one. One study reports that 58% of women overestimate the number of their childbearing years by five to ten years of age. *Id.* at 83. Nearly 40% of the women surveyed believed that their fertility would not decline until age forty, while recent studies show that it drops as much as 50% by age thirty. *Id.* As a result, women who delay childbirth as a result of economic or on-the-job pressure will, of necessity, have fewer children whether they like it or not.

61. Christopher J. Ruhm, *How Well Do Parents with Young Children Combine Work and Family Life* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 10247, 2004), *available at* http://www.nber.org/papers/w10247.

62. *Id.* at 3 (noting that mothers spend nineteen hours per week on housework compared to ten hours spent by fathers); Patricia Wen, *Gen X Dad Luxury Vacations, Fast-Track Careers, and Bigger Houses Used to Be a Priority for Family Men, but No Longer. Today's Young Fathers Are Taking*

Altogether, the average mother spends 35.5 hours per week on domestic tasks including childcare—almost the equivalent of a second full-time job.[63] If the mother of a young child gives in to time pressure by leaving her job or reducing her hours, she is immediately faced with wage pressure because her current and future earning potentials are affected. Even if she does not leave her job, researchers estimate that she will suffer a wage penalty.[64] In comparison to similarly situated workers who are not mothers, she will earn five to nine percent less per child. At least one author speculates that the reason may be exhaustion.[65]

A third factor affects women's decisions about childbirth: the cost.[66] In one recently commissioned study, participants reported that the factor that most influenced their childbearing decisions was the ability to afford a child.[67] The economic burden on parents raising a middle-class child through age eighteen now exceeds one million dollars in direct expenses and foregone wages, and it is estimated that an average child consumes fully 62% of the amount of resources consumed by an adult.[68] This one million dollars figure does not account for the cost of college education or for post-majority support, and childcare costs make up only a fraction of the expense.[69] It is no wonder that, despite national prosperity, people remain concerned about their ability to support an additional child.[70]

A family's individual capacity to afford children is not the only monetary consideration that may influence childbirth decisions. The strength of the broader economy also plays a role.[71] Short-term economic booms and busts, along with increased housing prices, have caused younger people to delay starting a family and to focus instead on the accumulation of human capital through education and career advancement.[72] In addition, an increasing number of younger couples

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Paternity Leaves, Rejecting Overtime, and Rushing Home After Work to Do All the Things Many of Their Own Fathers Didn't, BOSTON GLOBE, Jan. 16, 2005, *available at* 2005 WLNR 683363 (citing study conducted by Families and Work Institute in New York finding that fathers spend 2.7 hours per workday caring for children while mothers spend 3.3 hours per day).

63. *Id.* This number represents 19 hours per week of domestic work in addition to 3.3 hours per day of childcare activities.

64. LONGMAN, *supra* note 5, at 74.

65. *Id.*

66. WESTON ET AL., *supra* note 54, at 126.

67. *Id.*

68. LONGMAN, *supra* note 5, at 34, 38.

69. Nonetheless, they can be significant, ranging from 5%–30% of a family's disposable income. *See* Ruhm, *supra* note 61, at 7.

70. WESTON ET AL., *supra* note 54, at 151.

71. *Id.* at 101.

72. *Id.*

choose to be dual-earner couples in order to avoid the prospect of dual unemployment.[73]

These trends comport with historical demographic observations. The United States' total fertility rate prior to the Great Depression was 3.3 children per woman.[74] During the Depression, the total fertility fell to 2.1 children per woman.[75] This was the first baby bust. The total fertility rate rose slightly during the pre-war period but never above 3.0.[76] The post-war era brought change. It favored young adults and allowed them rapid upward socioeconomic mobility.[77] By 1957, at the height of the baby boom, the national birth rate had soared to 3.6 children per woman.[78] The strong birthrate and strong economy lasted for approximately a decade.[79] Then, the 1970s brought another change in the form of social tension and economic stagnation. The birthrate plummeted to 1.7 by 1976 and remained low until the economy improved.[80] These data indicate that childbearing decisions are not influenced by personal economy alone. The national economy also plays a role. Accordingly, the United States should consider whether it is able to influence maintenance of a stable level of population. Decline in the birthrate, in conjunction with the marked increase in the elderly population, might cause an economic downturn, which might further depress the birthrate, which might further worsen the economy, and so on.[81] It would seem appropriate, then, to take preventative measures aimed at staving off the next baby bust.

Abroad, incentives have ranged from the expected to the bizarre. Several European countries have instituted a panoply of family-oriented tax credits including child allowances and child care credits.[82] For instance, Germany's new Elterngeld program allows one new parent

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73. *Id.*

74. KLEIN, *supra* note 15, at 156.

75. *Id.*

76. *Id.*

77. *Id.* at 175. For instance, families benefited from a strong economy in combination with tax allowances for home ownership and the availability of affordable housing. *Id.* at 176.

78. *Id.* at 156.

79. *Id.*

80. WATTENBERG, *supra* note 1, at 63.

81. This, of course, assumes that technological advances over the next fifty years will not mitigate any reduction in the labor force. Honda's Asimo robot has already met with seven heads of European state, including German Chancellor Gerhard Schroeder. *See* Honda Worldwide, *The Worlds Most Advanced Humanoid Robot Meets Members of the EU*, Jan. 25, 2005, http://world.honda.com/news/2005/c050125_c.html.

82. Anne Reinstadler et al., *Comparative Study on the Effects of Family Policy in French-Speaking Countries*, 1 J. POPULATION & SOC. SECURITY 492, 520 (Supp. 2003), *available at* http://www.ipss.go.jp/webj-ad/WebJournal.files/population/2003_6/19.Reinstadler.pdf.

who stops working to claim an allowance of up to $2,375 per month for twelve months.[83] Elsewhere, Australia offers a one time payment of $3,000 per newborn.[84] The mayor of Caldzadilla, Spain, presents each new mother with an Iberian piglet.[85] Singapore, on the other hand, has launched a line of government-sponsored fragrances to induce fertility: musky for men and floral for women.[86] Britian, ever sensible, furnishes baby bonds that allow newborn children to start trust funds.[87]

Obviously, there are a variety of ways to approach the problem, many of them beyond the scope of the paper, such as increased subsidization of childcare or the provision of cash payments to parents or to children.[88] I focus here solely on use of the family as the taxable unit. I do not view my proposal as a stand-alone measure that would single-handedly ward off population shocks; however, it could play a useful role in a package of measures aimed at population stabilization.[89] Adoption of the family as the taxable unit stands out among the available tax alternatives because it would bring theoretical consistency to the current structure, which provides a smattering of family-related provisions but fails to take a holistic view of the family. In addition,

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83. Stephen Graham, *Germany Hopes Bonus Will Finance Baby Boom*, STAR-TELEGRAM, Jan. 4, 2007, at A9.

84. *Birth Rate Linked to Fear of Losing Job*, CANBERRA TIMES, Jan. 29, 2005, *available at* 2005 WLNR 1211831.

85. LONGMAN, *supra* note 5, at 145.

86. WATTENBERG, *supra* note 1, at 123. The fragrances are named "Romancing Singapore Eau de Parfum." *Id.*

87. Graham, *supra* note 83.

88. For instance, one recent study noted that employers' family leave provisions in the United States are "suboptimal." *See* Ruhm, *supra* note 61, at 8. According to the study, paid parental leave of a certain length would improve women's labor market outcomes and would benefit children. *Id.* This might, in itself, foster greater fertility. The study also revealed that access to high-quality formal day care improves school readiness in pre-kindergarten children. *Id.* Knowledge of the benefits of daycare might affect fertility by removing mothers' doubts about working rather than staying at home. Other useful measures might include those that would provide greater access to quality childcare or those that would defray the cost of a child's consumption by providing targeted benefits.

89. Most family-friendly measures could be employed to this end. For instance, Anne Alstott has recommended the creation of "caretaker resource accounts." ANNE ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 75–78 (2004). The accounts would provide funds for childcare, for the caretaker's education, or for the caretaker's retirement savings. *Id.* at 78. By making additional resources available for these uses, caretaker accounts would ameliorate the loss of resources and opportunities inherent in the continuous care obligation assumed by caretakers. *Id.* at 90. In contrast, Donald Tobin has proposed the creation of a "Child Investment Fund" that would make annual payments directly to children. Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457, 459 (2004). The stipends would alleviate societal underinvestment in children's human capital, and children would be required to repay them upon maturity. *Id.* at 457–59. These proposals, and many others, recognize that in the aggregate, children are a net good even though they place financial and other strictures on their caretakers. My proposal is similar in this regard.

adoption of the family taxable unit would allow families to individually allocate their added resources in accordance with their own, rather than the government's, preferences.

III. IS FAMILY PLANNING RESPONSIVE TO CHANGES IN TAX LAW?

Before discussing the merits of the method, it is necessary to answer a gateway question: whether women adapt their family-related behaviors in response to changes in the tax law. Empirical studies have repeatedly suggested that a small, but measurable, portion of individuals respond to tax law amendments. These studies fall into three separate, but not insular, categories: the tax effects on labor supply, the marriage decision, and the childbearing decision.

Studies regarding the effect of taxes on labor seem to be the clearest and most abundant. For instance, it is "widely accepted" that the Earned Income Tax Credit increased labor force participation by single mothers.[90] This is because work force participation among single mothers remained at a near constant level from 1975 to 1992 but rose very rapidly after expansion of the credit.[91] Results of another study suggest that expansions in the credit have increased married men's participation in the workforce but have decreased married women's participation.[92] In addition, a 1995 economic analysis of the Tax Reform Act of 1986 revealed a correlation between increased labor participation of high-income, married women and reduced marginal tax rates.[93] A third study attributed part of the 27% increase in annual hours of work among women between 1981 and 1989 to the same act.[94]

Studies have also revealed a low, but measurable, response to the tax law in marriage decisions. Although their results are not breathtaking, these studies are important to consider nonetheless, given the still-close

90. NADA EISSA & AUSTIN NICHOLS, 2005 AEA/NEA JOINT SESSION ON "SKILLS, POLICY AND LABOR MARKET OUTCOMES ACROSS DEMOGRAPHIC GROUPS," TAX-TRANSFER POLICY AND LABOR MARKET OUTCOMES 1 (2005), *available at* http://www.urban.org/UploadedPDF/411237_tax_transfer.pdf; Nada Eissa & Jeffrey B. Liebman, *Labor Supply Response to the Earned Income Tax Credit*, 111 Q. J. ECON. 605, 607 (1996) (noting that the introduction of the EITC correlates to increased labor force participation of single women with children relative to those without).

91. Ruhm, *supra* note 61, at 2.

92. *See* Nada Eissa & Hilary Williamson Hoynes, *The Earned Income Tax Credit and the Labor Supply of Married Couples* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 6856, 1998), *available at* http://www.nber.org/papers/w6856; Ruhm, *supra* note 61, at 10.

93. Nada Eissa, *Taxation and Labor Supply of Married Women: The Tax Reform Act of 1986 as a Natural Experiment* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 5023, 1995), *available at* http://www.nber.org/papers/w5023 (attributing the increase to a 36% increase in the after-tax wage of a woman in the top bracket who earned under $30,000 per year).

94. *Id.* at 6.

relationship between marriage and childbearing. In 1995, James Alm and Leslie Whittington found a negative correlation between increased income tax rates and the aggregate marriage rate: when income taxes rise, the marriage rate declines.[95] The effect is, however, "quite small."[96] A similar correlation occurs with an increase in the marriage penalty.[97] These results were confirmed by Hector Chade and Gustavo Ventura, who found that increased tax rates on married couples result in a small, but measurable, reduction in the number of marriages.[98] The study also demonstrated that increased tax rates on married couples are positively correlated with the number of couples who cohabit rather than marry.[99] Finally, a recent examination of welfare reform showed similar responsiveness.[100] The study observed changes in family structure, such as household composition and marital status, as a result of the passage of the 1996 Personal Responsibility and Work Opportunity Act.[101] It is reasonable to conclude, based on the results of these studies, that families at the margins are responsive to changes in the law that affect their financial well-being.

This generalization cannot be extended to the childbearing decision without further examination. Career orientation, marital status, and financial well-being are only three of the myriad characteristics, beliefs, and preferences that might affect one's choice to have a child. Many of these characteristics are personal and unique to their owner, such as religion or culture, marital status, or number of siblings.[102] Tax policy cannot affect these circumstances; however, it can lessen obstacles faced by those who want additional children but whose choice is limited by time and wage pressures. As a result, the question of whether would-be mothers will respond to family-friendly changes in the tax law is a

95. James Alm & Leslie A. Whittington, *Income Taxes and the Marriage Decision*, 27 APPLIED ECON. 25, 26 (1995).

96. *Id.*

97. *See* James Alm, Stacy Dickert-Conlin & Leslie A. Whittington, *Policy Watch: The Marriage Penalty*, 13 J. ECON. PERSP. 193, 200 (1999).

98. Hector Chade & Gustavo Ventura, *Income Taxation and Marital Decisions*, 8 REV. ECON. DYNAMICS 566, 590–91 (2005).

99. *Id.* at 591.

100. *See* Marianne P. Bitler, et al., *The Impact of Welfare Reform on Living Arrangements* (Nat'l Bureau of Econ. Research, Working Paper No. 8784, 2002), *available at* http://www.nber.org/papers/w8784.

101. *Id.*

102. *See* Raquel Fernandez & Alessandra Fogli, *Culture: An Empirical Investigation of Beliefs, Work, and Fertility* (Nat'l Bureau of Econ. Research, Working Paper No. 11268, 2005), *available at* http://www.nber.org/papers/w11268; Raquel Fernandez & Alessandra Fogli, *Fertility: The Role of Culture and Family Experience* (Nat'l Bureau of Econ. Research, Working Paper No. 11569, 2005), *available at* http://www.nber.org/papers/w11569.

unique one. The field for change is very narrow, including only those families who might want additional children but who must be financially encouraged to have them. Because there is no practical, non-intrusive means of identifying such families, the policy, in order to be effective, must apply broadly to all families. As a result, any empirically measurable response will seem slight in relation to the benefit-eligible cohort, even if the policy has its intended effect.

Strong empirical data on the effect of tax policy on birth decisions is not available for a representative sample of the United States population.[103] This is because the United States does not yet have any avowedly pro-natalist or anti-natalist tax laws. One study, conducted by Leslie Whittington, James Alm, and H. Elizabeth Peters, focused on the personal exemption for dependents.[104] The authors observed that the personal exemption for dependents is implicitly pro-natalist because it encourages fertility by decreasing the relative cost of each child.[105] Using an economic model with data on the birthrate, the amount of the dependent exemption, margin tax rates, and wages, among other things, the study generated results that "support the hypothesis that an increase in the tax value of the personal exemption leads to an increase in demand for children."[106] The authors therefore concluded that tax policy may have an impact on aggregate birth decisions.[107]

The Whittington-Alm-Peters study supports the findings of macroeconomic and microeconomic studies of European tax policies indicating that strong family policies influence the birthrate.[108] For instance, a study of family allowances in various countries from 1977 until 1981 showed a strong positive correlation (0.81) between family-

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103. It has been suggested that one could look to studies assessing the effect of changes in welfare benefits on fertility. In my opinion, the two situations are not comparable. Recipients of welfare rely upon the payments they receive to pay for subsistence-level consumption. A middle-income family would not face the same consideration. Furthermore, studies of the effect of welfare on fertility have been inconclusive. *See* Theodore Joyce et al., *Welfare Reform and Non-Marital Fertility in the 1990s: Evidence from Birth Records* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. 9406, 2002), *available at* http://www.nber.org/papers/w9406 (noting that welfare reform has not reduced non-marital fertility and that studies assessing the effect of welfare benefits on fertility have been inconclusive); Melissa S. Kearney, *Is There an Effect of Incremental Welfare Benefits on Fertility Behavior? A Look at the Family Cap* 3, 6 (Nat'l Bureau of Econ. Research, Working Paper No. 9093, 2002), *available at* http://www.nber.org/papers/w9093 (noting that implementation of a family benefits cap failed to change the birthrate of women on welfare and stating that welfare fertility studies in the 1970s, 1980s and 1990s produced mixed results).

104. Leslie A. Whittington, James Alm & H. Elizabeth Peters, *Fertility and the Personal Exemption: Implicit Pronatalist Policy in the United States*, 80 AM. ECON. REV. 545 (1990).

105. *Id.* at 547.

106. *Id.* at 552.

107. *Id.*

108. Reinstadler et al., *supra* note 82, at 523.

friendly policies and recorded births.[109] It also observed that pro-family countries added more population during the post-war baby boom and suffered a lesser decline in birthrate during the ensuing baby bust.[110] Another study found that while family-friendly policies in France did not influence families' decisions to have a first child, they increased the birth rate of second-born children among families with limited income.[111] A third study, conducted in 1997, concluded that a 25% increase in family benefits in France would raise the number of children born per year by 4%, which would be the equivalent of a 0.07% increase in its total fertility rate.[112]

On the basis of these studies, and studies of how tax policies affect labor and marriage decisions, it is reasonable to predict that a family-friendly change in the tax law would have some small, but measurable, effect on families' childbearing decisions. Using the studies of labor participation as an example, it is also reasonable to predict that the effect would be most observable at the margin. In other words, affected families would be those that, for reasons of time or wage pressure, believed they could not afford an additional child, but whose need for additional resources was equal to or less than the benefit provided by the tax amendment.

IV. FAMILY TAXATION IN THE UNITED STATES

In order to identify what sort of amendment to the Internal Revenue Code might be appropriate to support such families, it is necessary to review existing family-oriented tax laws. The Internal Revenue Code contains a number of such provisions, including various deductions and credits, specified rates for couples and for heads of household, and the aforementioned exemption for dependents. In each of these provisions, one can see Congress's concern for families. Yet, when viewed as a collective course of action intended to benefit families, the provisions appear rather assorted and motley. This is because they are undergirded by sometimes conflicting economic conceptualizations of the family. At its core, the Internal Revenue Code continues to apply to individuals, not families, and many family benefits are available only to those with limited means. The following paragraphs detail some of the provisions currently applicable to families under the Code: personal and dependant exemptions, child and dependant care credits, medical care benefits, the

109. *Id.*

110. *Id.*

111. *Id.* at 524.

112. *Id.*

earned income tax credit, head of household status, and joint filing.

1. Personal and Dependent Exemptions

The Internal Revenue Code provides a variety of family-related credits and deductions; however, most are either means-tested or phased out at high levels of income.[113] For instance, the Code allows taxpayers a personal exemption and an additional exemption for each qualified dependent.[114] A qualified dependent includes a taxpayer's children.[115] The exemption was $3,300 for 2006, but it is phased out for high income taxpayers.[116]

A taxpayer does not receive the dollar value of the dependent exemption but instead receives the tax savings that it generates. For example, if a taxpayer in 2006 had been subject to a tax rate of 15%, she would have received tax savings of less than $500, which is equivalent to the tax that she would have paid on the exempt amount of $3,300. While that amount is better than nothing, it has not kept pace with the growing economy. According to one author, "Since the late 1940s, the tax burden on households with dependents has grown disproportionately in comparison with households without dependents."[117] The exemption has also been criticized because it is not tailored to the actual cost of raising children.[118] The dependent exemption's tendency to become outmoded in times of economic growth would not be a problem if the United States adopted the family taxable unit as proposed in Part V. Indeed, the dependent exemption would become utterly unnecessary because the rate structure, when combined with family income splitting, would alleviate disproportionality of the tax burden on families who choose to have additional children. The dependent exemption could be eliminated entirely.

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113. *See, e.g.*, 26 U.S.C.A. §§ 21, 24, 151(c) (West 2006).

114. 26 U.S.C. § 151(c).

115. *Id.* § 152.

116. Rev. Proc. 2005-70, 2005-2 C.B. 979. The phase-out amounts for 2006 range from $112,875 for married taxpayers filing separately to $225,750 for taxpayers who are married filing jointly. *Id.*

117. Ayla A. Lari, *Sharing Alike: French Family Taxation as a Model for Reform*, 37 DUQ. L. REV. 207, 218 (1999). The author notes that "[t]o be the equivalent to the 1948 exemption, the 1984 exemption si ould have been $5,600; instead it was $1,000." *Id.*

118. *See* William M. Gentry & Alison P. Hagy, *The Distributional Effects of the Tax Treatment of Child Care Expenses* (Nat'l Bureau of Econ. Research, Working Paper No. 5088, 1995), *available at* http://www.nber.org/papers/w5088 (noting that the uniform dependent exemption is not tailored to the cost of caring for a young child versus the cost of caring for an older one).

2. *Child and Dependent Care Credits*

In addition to exemptions for dependents, the United States provides child and dependent care credits. The child credit was $1,000 per child in 2007, with a phase-out beginning at $110,000 for taxpayers filing a joint return and $75,000 for unmarried taxpayers.[119] The dependent care credit applies to individuals who maintain a household that includes a qualified dependent, such as a child under the age of thirteen or a handicapped individual.[120] The provision allows a 35% credit against tax for the expense of dependent care,[121] but taxpayers may only claim $3,000 of expenses for one dependent or $6,000 of expenses for multiple dependents.[122] The credit is phased out beginning with income in excess of $15,000 and is completely eliminated at income greater than $85,000.[123] The Code offers a similar credit for adoption expenses not to exceed $10,000.[124] Last, but not least, the Code provides that taxpayers may exclude up to $5,000 of income as part of an employer-provided dependent-care assistance program.[125] An employee who participates in such a program cannot claim the dependent care credit, but the program must provide childcare that conforms to the mandates of the Code section that governs the credit.[126] Although the child credit, the dependent care credit and the dependent care assistance exclusion do not actively impair women's childbirth decisions, they are of limited usefulness to middle-income, two-earner couples due to the phase-out levels. Less severe limitations, or better yet, a different system of taxing families altogether, could more effectively foster a family's ability to choose to have additional children while lessening the financial burden attendant upon the secondary earner's choice to work.

3. *Medical Care Benefits*

The Code also recognizes the family as an economic unit in its health care provisions. For instance, § 35 allows taxpayers to deduct the cost of health insurance that they purchase for dependents.[127] Section 104 provides that the payout from such insurance resulting from a

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119. 26 U.S.C.A. § 24 (West 2006).
120. *Id.* § 21(a).
121. *Id.* § 21(a).
122. *Id.* § 21(c).
123. *Id.* § 21(a)(2).
124. *Id.* § 23.
125. *Id.* § 129(a).
126. *Id.* § 129(e)(1), (e)(7).
127. *Id.* § 35(a).

dependent's illness or injury is excluded from income.[128] Likewise, § 106 excludes from income amounts paid by employers to insure the dependents of employees, and § 105 excludes the payout of those policies from income.[129] Finally, § 213 allows a taxpayer to deduct the uninsured cost of a dependent's medical and dental expenses from income.[130] These provisions make clear that Congress regards the family as a unit when health care expenses are involved.

4. *Earned Income Tax Credit*

The Earned Income Tax Credit (EITC) is arguably the most important family-oriented credit in the Internal Revenue Code. The credit is refundable and is available to low-income working individuals and families.[131] In 2003, more than 21 million taxpayers collected more than $36 billion in EITC payments, lifting many of the credit's recipients above the poverty line.[132] Like most other family-friendly provisions in the Internal Revenue Code, the EITC is means tested. It is worth approximately forty cents for every dollar earned, and it is phased out as income increases to specified levels.[133] To qualify, the taxpayer's earned income and adjusted gross income must be less than $30,338 if the taxpayer has one qualifying child and less than $34,458 if the taxpayer has more than one qualifying child.[134] Although broad in scope and extremely valuable at lower income levels, as with other credits in the Internal Revenue Code, the EITC does little to help career women in middle-income families who would like to have, but cannot afford, additional children.

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128. *Id.* § 104.

129. *Id.* §§ 105, 106 .

130. *Id.* § 213.

131. Internal Revenue Serv., Dep't of the Treasury, It's Easier Than Ever To Find Out if You Qualify for EITC, http://www.irs.gov/individuals/article/0,,id=96406,00.html (last visited June 16, 2007). Congress originally approved the EITC in 1975 in part to offset the burden of social security taxes and to provide an incentive to work, but its scope has since expanded. *Id.*

132. *Id.*

133. *Id.*

134. Internal Revenue Serv., Dep't of the Treasury, Frequently Asked Questions and Answers: Qualifying Child(ren) Residency Certification Test, http://www.irs.gov/individuals/article/0,,id=119267,00.html (last visited June 16, 2007). A qualifying child is one who is the taxpayer's son, daughter, adopted son or daughter, stepson, stepdaughter, brother, sister, stepbrother, stepsister, or a descendent of any of them, and whom the taxpayer cares for as her own child. *Id.* A qualifying child must be under the age of 19 or must be under the age of 24 and a fulltime student. *Id.*

5. Head of Household Status

Another way in which the Code recognizes families is through provision of a separate rate schedule and standard deduction for heads of household.[135] A head of household is a person who is not married and who has at least one child.[136] By dint of being a single parent, a head of household benefits from wider income brackets at lower levels of taxation than those that apply to single filers.[137] As a result, heads of household bear less tax burden per dollar of income than single people bear.[138] In addition, heads of household are entitled to a larger standard deduction than single people.[139] In 2006, the standard deduction for heads of household was $7,550, which is significantly greater than the $5,150 deduction given to single filers.[140] It is worth noting that the difference only benefits taxpayers who do not itemize deductions on their returns. Practically speaking, then, it benefits only taxpayers who do not owe a significant amount of mortgage interest or deductible state tax.

6. Joint Filing

Finally, no discussion of United States family taxation would be complete without joint filing. The Internal Revenue Code contains four rate tables: one for single filers, a second for joint filers, a third for married persons filing separately, and a fourth for heads of household.[141] Married couples are strongly encouraged to file joint returns. Those who do not may face less favorable treatment as married persons filing separately.[142] In 2006, if a husband earned nothing and a wife had taxable income of $50,000, the couple paid $9,171 if they filed separately.[143] If the husband had $10,000 of taxable income, and the wife had $40,000 of taxable income, they paid $7,810 if they filed

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135. *See* 26 U.S.C.A. § 1(b) (West 2006).

136. *Id.* § 2(b).

137. *Id.* § 1(b).

138. *Id.*

139. *Id.* § 63(b)(2).

140. *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, U.S. INDIVIDUAL INCOME TAX RETURN, FORM 1040 (2006).

141. *See* 26 U.S.C.A. § 1 (West 2006); INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PACKAGE 1040-1, 2006 1040 FORMS AND INSTRUCTIONS 65 (2006). To illustrate, the 2006 liability on taxable income of $50,000 for single filers and married persons filing separately was $9,171. *Id.* For heads of household it was $8,004, and for joint filers it was $6,774. *Id.*

142. *See* 26 U.S.C. § 1.

143. *Id.*

separately.[144] If the husband had $20,000 of taxable income, and the wife had $30,000 of taxable income, they paid $6,810 if they filed separately.[145] In any of these earning scenarios, the couple would have only paid $6,774 as joint filers, which is less than any of the separate filing options. Like the credits and deductions described above, the joint filing system provides a clear example of Congress's understanding of the taxable unit as something more than just an individual. Finally, although the joint filing system could be construed as a benefit to families, it is frequently criticized for its penalization of secondary earners, described below.

V. THE PURSUIT OF CONCEPTUAL COHERENCE AND FUNCTIONALITY

1. *Fractured versus Holistic Treatment of Families*

The provisions described above are concrete demonstrations of Congress's perception of the family as an economic unit.[146] Each provision recognizes a shared economic effect: families must shoulder additional expenses, and those expenses are tempered by economies of scale. Why, then, does Congress stop short of formally recognizing the family as the unit of taxation? Its failure to do so is conceptually inconsistent with other portions of the tax formula that recognize and reward family status. Accordingly, adoption of the family as the taxable unit would not be radical departure from the status quo. It would merely carry the current concept of income splitting among family members to its logical conclusion.

The family taxable unit is not without detractors. Despite its obvious intuitive appeal, and its current quasi-embodiment in the Code, use of the family as an economic unit has been criticized as antithetical to the individualist principles inherent in feminist theory. Marjorie Kornhauser has argued that regarding the family as an economic unit is tantamount to disregarding women's needs and contributions. Specifically, she asserts:

> [F]eminist theory undercuts the very premise that the family is an economic unit. The economic unit theory assumes that the family is a

144. *Id.*

145. *Id.*

146. In addition, Victor Thuronyi has suggested that the exclusion of gifts from gross income under § 102 of the Internal Revenue Code can be viewed as an extension of the family taxable unit concept. *See* Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 75 (1990). Professor Thuronyi's observation illustrates the omnipresence of the family in tax statutes.

> monolithic, homogeneous group in which all members share the same tastes and resources, including income, equally. Under this "benign patriarch" theory of the family, the male "head of household" traditionally speaks and acts for the unit. True pooling presumes equality, if not in contribution to the pool, then at least in free access to the pool. Although partners are moving toward more equal arrangements, disparities still exist.[147]

As it applies to my proposal, this observation lacks in two respects. First, it conflates control over family consumption choices with the economic burden that those choices impose on disposable income of the family. Children's consumption must necessarily be drawn from parents' resources, and it therefore affects both parents' ability to pay taxes either separately or in the aggregate.[148] In other words, children's consumption is a gender-neutral actor that impacts family members' bottom lines even where income pooling is incomplete. Second, the idea that the family taxable unit treats the family as "a monolithic [and] homogeneous group" headed by a "benign patriarch" who "speaks and acts for the unit," is, I suspect, increasingly obsolete.[149] To the extent that Professor Kornhauser's objection is based on the government's acknowledgement of the family as a cohesive group of people rather than an assortment of cohabiting strangers, it fails to account for the fact that, during childhood, children generally do not cover their own expenses.[150]

While viewing the family as a cohesive unit does, as Professor Kornhauser suggests, treat individual family members as part of an economic collective, it makes no assumptions about the distribution of resources within that collective. Rather, it observes that some of the resources acquired by members of the collective are used to purchase common goods such as a place to live, furniture for comfort, and food to eat. This observation does not require an espousal of "benign patriarchy." In addition, to the extent that use of the family as the taxable unit offends our perception of women as individuals (it does not

147. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 97 (1993).

148. Although Professor Kornhauser argues that families do not pool resources, in which case consumption of one family member should not affect another, the data are inconclusive. She states that 70% of all married couples in one survey deposited their earnings "solely in joint accounts." *Id.* at 86. A second survey, involving law students in committed relationships, revealed that over 55% "kept all wages jointly." *Id.* Note that these data, which indicate a high level of pooling on their own, do not address instances of partial pooling, which I predict would raise the numbers well above the 70% and 55% figures observed in Professor Kornhauser's surveys. As a result, the argument that family pooling is not supported by empirical data is not well founded, at least as regards basic expenses.

149. *Id.* at 97.

150. Dakota Fanning excepted, of course.

offend mine in the least), that offense is counterbalanced by the greater freedom of choice afforded to women under my proposal than under the current system of family taxation. Because the benefit provided by the family taxable unit is not dependent upon conformity to congressionally determined income or childcare standards, it is significantly less paternalistic than the smattering of credits, deductions, and assorted rates that the Code now contains. Finally, it bears noting that under my proposal, families would not be required to use the family taxable unit. Rather, the provision would be elective and would therefore extend to families, and the individuals within them, the opportunity to choose the best available outcome.

In conclusion, Congress already views families as economic units, and naturally so. Despite the objections noted above, the half-steps already taken by Congress demonstrate its acknowledgment of some level of economic interdependence among family members, and particularly children. To textually describe the family as an economically cohesive unit in only a select handful of Code sections while effectively treating it as a unit in all instances through provision of dependent exemptions in the calculation of taxable income is conceptually inconsistent. By providing scattered benefits, Congress has failed to provide holistic treatment of the family. Adoption of the family as the taxable unit is a clear and simple remedy to that problem.

2. *Neutrality and Freedom of Choice*

No matter how equitable from an economic perspective, adoption of the family taxable unit will be undesirable if it creates, rather than relieves, pressure on women's work and family choices. Inherent in the idea that some women would like to have additional children but feel that they lack sufficient time or resources is the idea that circumstances external to the family introduce inelasticity into the childbearing decision. Although the Code seeks to remedy some of the financial burden associated with childrearing, in most cases, the benefits provided are contingent upon a family earning very little income, making choices sanctioned by Congress, or both. These strictures constrain women's choices. For this reason, simply removing income restrictions from the Code's current benefits is not the best solution.

a. Freedom to Choose Work Either Inside or Outside of the Home

A significant element of the family benefits provided by the Code—the tax treatment of childcare expenses—applies only to families in which both parents work.[151] By carving out a financial benefit on the basis of childcare costs, Congress has recognized that childbearing and childrearing may limit women's job opportunities.[152] Nonetheless, allowances provided solely to working mothers evidence a labor-market oriented approach to family taxation.[153] By acknowledging the difficulties faced by working mothers without also acknowledging the difficulties faced by stay-at-home mothers, Congress has, either purposefully or inadvertently, expressed a preference for market participation over at-home labor.[154] In her article, Taxing Housework, Nancy Staudt notes the lack of justification for this preference given that women's individual preferences for housework versus market work vary.[155] Anne Alstott, too, has posited that encouraging secondary earners to enter the marketplace does not necessarily produce a laudable result.[156] This is because "the goal of encouraging market work presupposes that women's nominal preference for family labor either is suspect and ought to be changed, or is simply dysfunctional."[157] Stated

151. *See* 26 U.S.C.A. §§ 21, 129 (West 2006).

152. *See* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1605 (1996) (noting that §§ 21 and 129 demonstrate Congress's recognition that children interfere with the pursuit of economic independence). *See also* ALSTOTT, *supra* note 89, at 21–27 (noting that childrearing is time-consuming and unpredictable work that may result in lost wages, lower career achievement, and lost social security benefits).

153. *See* Staudt, *supra* note 152. I say "inadvertently" because the joint filing system clearly discourages labor-force participation by secondary earners in some instances.

154. *Id.*

155. *Id.* at 1585–86. As an empirical matter, the level of child care credits that a family expects to receive is positively correlated with a mother's return to work within three months of her first child's birth. *See* Jacob Alex Klerman & Arleen Leibowitz, *Child Care and Women's Return to Work after Childbirth*, 80 AM. ECON. REV. 284, 287 (1990).

156. *See* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2046 (1996). In fact, I would argue that it does not. The decision to be a stay-at-home parent is an intensely personal choice with which the government should not interfere, and it involves elements of both the parent's welfare as well as the child's. The effect of daycare on children is, as of yet, unclear. Studies of its effects have produced contradictory reports. *See* Michael Baker et. al, *Universal Childcare, Maternal Labor Supply, and Family Well-Being*, 10–11 (Nat'l Bureau of Econ. Research, Working Paper No. 11832, 2005), *available at* http://www.nber.org/papers/w11832 (detailing conflicting reports on the effect of childcare on wellbeing of the child). Baker and his team found that daycare in Quebec increased parents' perception of their children's hyperactivity, aggression, inattention, health, motor and social skills. *Id.* at 4. They note, however, that there are a variety of explanations for the result, including the study's reliance on parents' subjective observations. *Id.* Other studies indicate that the rise of the dual-income family has not been detrimental to children. For instance, a corresponding increase in paternal participation has been shown to aid children's cognitive development. *See* Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1048 (1993). In addition, children raised by stay-at-home mothers are more likely to exhibit gender bias against women. *Id.* Another study has shown that children benefit from growing up with a mother who is satisfied with her occupation rather than one who feels stifled. *Id.* It is fair to say that there is no real consensus on the net effect of mixed care.

157. *See* Alstott, *supra* note 156, at 2047. Professor Alstott notes that tax policy proposals that

more simply, not every secondary earner wants to work outside of the home, and there is nothing aberrant about such a preference.[158]

Adoption of the family taxable unit as an elective provision would neither encourage nor discourage labor market participation. Instead, it would provide a labor-neutral benefit by financially cushioning households that forego a second wage while allowing those with two earners to afford necessary childcare or other consumption goods.[159] Its use therefore allows families to make the labor participation and spending decisions that are optimal in light of their unique circumstances. In this regard, the family taxable unit is preferable to the Code's current allowances.

b. Freedom to Choose How Best to Provide Care for One's Children

In addition to expressing a preference for dual-earner households, the Code's childcare provisions also express a preference for certain kinds of care. For families in which both parents choose to work outside of the home, childcare is a vital issue and an intensely personal choice. Some families prefer the care of relatives or close friends. Yet other families prefer a facility in which their child will engage in educational activities. Other families may prefer care provided by a religious institution or a neighbor. Despite these myriad preferences, availability of the childcare benefits provided by the Code is contingent upon the parents' choice of care.

Under the current law, parents with sufficiently low income may claim a means-tested credit for dependent care.[160] The credit is

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affect women are often met with criticism because feminist scholars "differ significantly in their objectives." *Id.* at 2002. She details three such conflicting objectives: equal treatment of men and women, encouragement of market labor participation, and the provision of financial security to caregivers. *Id.* Family allowances, like the family taxable unit, "represent a middle ground." *Id.* at 2053. *See also* Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245, 251 (1998) (recommending the deduction of childcare expenses as business expenses as a "fair" solution that will "prevent the income tax from inordinately distorting people's choices.").

158. In the past, the role of law and culture in encouraging women to choose a particular course—that of staying at home—is at bottom of the problem that has generated the push to encourage women's labor. Amy Wax has noted that societies have attempted to keep women out of the labor market "through the application of custom, law or force to, in effect, close off choices entirely or alter the background conditions against which choices are made." Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495, 495 (1999). This societal approach is objectionable because it sequesters some women who would have preferred to participate in the labor market. It is curious, then, that some feminist scholars would encourage lawmakers to once again "alter the background conditions" in a way that could result in pressure on women who would prefer to remain at home.

159. *See* Alstott, *supra* note 156, at 2045.

160. 26 U.S.C.A. § 21(a) (West 2006).

calculated as a percentage of "employment-related expenses,"[161] which are those expenses that are "incurred to enable the taxpayer to be gainfully employed."[162] They include things like babysitting and daycare;[163] however, if a family chooses to place a child in a care center outside of the home, the center must be state certified and must provide care for more than six children.[164] Children older than thirteen do not qualify as dependents for purposes of the credit, so parents receive no tax benefit to offset the cost of their care.[165]

Although the dependent care credit can be generous for low-income families, it is overly paternalistic. First and foremost, it assumes that children over the age of thirteen do not require care even though mothers of teenage children may be more likely to have fulltime jobs. Second, it does not apply to families with a stay-at-home parent, even though that parent may sometimes need a respite. Furthermore, it limits the choices available to families who prefer childcare outside of the family home. In other words, the credit is available only to those families who acquiesce in or share Congress's childcare preferences.

The family taxable unit is different. Because it allows families the choice of how to expend their additional resources, it is significantly less paternalistic than the dependent care credit. Because relief under the family taxable unit would be provided in the form of reduced withholding, it would not be contingent upon particular labor force decisions or particular childcare expenditures. Furthermore, both the primary and secondary earner would share in the benefit and could separately decide how best to utilize it. This choice, whether made by the family as a group, or by individuals within the family, should permit the preferred allocation of resources. For instance, families could choose out-of-the-home childcare provided by a trusted neighbor or a church group without losing the tax benefit. Finally, the secondary earner could choose to leave the workforce without jeopardizing the benefit. None of these options are available under the current system.

VI. ADOPTING THE FAMILY TAXABLE UNIT

The family taxable unit is not a new idea, but it is one whose time has come. It is equitable, it addresses freedom of choice, and it is easily understood. As one scholar noted, "It is time to rethink our first

161. *Id.*

162. *Id.* § 21(b)(2)(A).

163. *Id.*

164. *Id.* § 21(b)(2)(B), (C).

165. *Id.* § 21(b)(1)(A).

premises of taxation and the family. The family is a complex and central social institution, and we can no longer treat it in a two-dimensional manner."[166] Likewise, witnesses before the President's Advisory Panel on Federal Tax Reform in March of 2005 have called for fairer treatment of families.[167] Eugene Steuerle, in particular, has suggested combining the child, earned income, and dependent care credits; dependent exemptions; and filing status into a simpler, more transparent system.[168]

The dependent care credit alone, with its myriad exceptions, qualifications, and definitions, covers three entire pages of the Internal Revenue Code despite its miniscule font.[169] Even explanatory documents targeted at taxpayers are insufferable. The instruction booklet for the 2006 Form 1040 was 143 pages long.[170] Because the family taxable unit would entail the creation of a new rate structure, it would obviate the need for most credits and deductions currently provided by the Code. As a result, calculation of one's liability would be simple, and the effect of an added child would be predictable. Taxpayers considering an addition to the family could easily determine the change in their tax liability. By contrast, under the current system, only the most inquisitive and patient taxpayers can accurately predict the resulting change.

The Internal Revenue Code's complexity makes it not only opaque, but also malleable. Because it contains so many provisions, the Code is a convenient and flexible legislative tool. It is amended with astonishing frequency and often for the purpose of currying political favor.[171] Because of its changeable nature, individuals and families are unlikely to rely on the deductions and credits provided in the Code when budgeting for the addition of a child. Because adoption of the family

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166. McCaffery, *supra* note 156, at 1060.

167. Susanne Pagano, *Tax Experts Urge Panel to Address Fairness, Families in Reform Proposal*, Daily Tax Rep. (BNA) No. 56, at G-8 (Mar. 24, 2005).

168. *Id.*

169. *See* Internal Revenue Code (CCH) 102-05 (Jan. 2006).

170. *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, 2006 1040 INSTRUCTIONS (2006), *available at* http://www.irs.gov/pub/irs-pdf/i1040gi.pdf.

171. *See, e.g.*, Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 ; Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577; Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, §§ 1333, 1335, 1341, 119 Stat. 594, 1026-49; American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418; Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752; Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755.

taxable unit would reduce the number of provisions applicable to individual taxpayers, it would also reduce the opportunity for knee-jerk changes to the substance of the Code.

There are other sound reasons to choose the family taxable unit. First, it would aid families who hope to grow, which may have the salutary effect of contributing to the maintenance of population stability. Second, when determining ability to pay tax, it is reasonable to account for the number of family members for whom subsistence-level consumption goods must be provided. Although studies suggest that some degree of separate finances are prevalent among young, dual-earner couples, even critics of the pooling justification for income aggregation admit that birth of a child can spur the pooling of resources.[172] Even where it can be demonstrated that a mother and father make separate use of their disposable incomes, they must share subsistence-level consumption, at the very least, with their children. Third and finally, as described above, adoption of the family taxable unit would bring conceptual coherence to the taxation of families while facilitating individual mothers' preferred reproductive and labor decisions.

1. The McIntyre-Oldman and Bittker Proposals

Both Professor Bittker and Professors McIntyre and Oldman have developed normative models for family taxation that are based on use of the family taxable unit (the Bittker model and the MacIntyre-Oldman model, respectively).[173] In the Bittker model, parents would deduct childrearing expenses from income, and children would include those expenses on their own income tax returns.[174] Because such expenses could not be accurately accounted and because enforcement under this system would be both intrusive and administratively burdensome, Professor Bittker recommended allocating a fixed portion of the parents' income to each child.[175]

Likewise, under the McIntyre-Oldman model, income would be attributed not to the family members who earn it but instead to the family members who benefited from it.[176] MacIntyre and Oldman argue

172. Kornhauser, *supra* note 147, at 88.

173. *See generally* Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977).

174. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1449 (1975).

175. *Id.* Allan Samansky has noted this problem as well. *See* Allan J. Samansky, *Tax Policy and the Obligation to Support Children*, 57 OHIO ST. L.J. 329, 351 (1996).

176. McIntyre & Oldman, *supra* note 173, at 1575.

that this form of benefit taxation comports with the Haig-Simons definition of income, which includes consumption in the tax base.[177] McIntyre and Oldman argue that each family member's income under the Haig-Simons definition must include his or her benefit from or consumption of family goods, regardless of whether that consumption is attributable to another family member on the basis of property law.[178] As a result, the McIntyre-Oldman model requires that family income, which may or may not include the income of minor children, be attributed to family members under a consumption-based formula.[179] For couples without children, income would be aggregated and split evenly between the two individuals.[180] Finally, all taxpayers would consult a single rate table, which would institutionalize the secondary-earner penalty.[181]

MacIntyre and Oldman argue that because a child consumes less than an adult, and because their model was designed to reflect families' financial realities as accurately as possible, per capita income sharing under the model would be excessive, particularly at upper levels of income.[182] Also, they argue that economies of scale mandate that a decreasing share of income should be attributed to children as family size increases.[183] Presumably, the decreasing share would be based on empirical studies or on economic models. Note that, in contrast, France, which also employs the family taxable unit, assigns a quotient familial value of 0.5 to a family's first two children and a value of 1.0 to subsequent children, reflecting support for the birth of third and

177. *Id.* at 1575–76. McIntyre and Oldman view the benefits received and shared by family members as a kind of consumption. *Id.* at 1577. For example, although a parent who buys groceries is a "consumer in the market sense," family members are the actual consumers of the food that the parent brings home. *Id.*

178. *Id.* The professors do not address the question of whether a parent who earns income consumes it by spending it on goods and services provided to the family. They assert that the question is irrelevant because the child is the taxpayer with whom they are concerned. *See id.* at 1603. This feint blurs the issue of whether they intend the Haig-Simons definition to apply to the family as a whole or to the individual members. If applied to individuals, it follows that the earner parent should be viewed as engaging in consumption when he or she provides resources to the family. This would result in double-counting under the proposal.

179. *Id.* at 1595.

180. *Id.* at 1596. A relevant question might be whether a child's consumption level changes over time and, if so, whether the tax system should take that change into account. Consumption might also be affected by the number of children. For instance, second and third children blessed (or cursed) with hand-me-downs might consume less. *Id.* Finally, there might be an income level so blatantly in excess of children's consumption that it should not be split among them. *Id.*

181. *Id.* at 1594.

182. *Id.* at 1605.

183. *Id.* at 1605.

subsequent children.[184]

The Bittker model and the McIntyre-Oldman model were not forwarded with an eye toward assisting in maintenance of a stable population level. In fact, Professor Bittker, who was writing from beneath the rubble of Paul Ehrlich's Population Bomb, stated that the income splitting benefit might be disallowed "for a year or two after the birth of an 'excess' child."[185] Clearly, these models were unconcerned with whether families wanted, but could not afford, additional children. Rather, they were intended to comprehend the real-life financial situation of families more accurately than the Internal Revenue Code.[186] For the purpose of providing encouragement to would-be moms and dads, adoption of a more flexible and financially generous family taxable unit is now preferable.

2. *Assigning Values Within the Family Denominator*

The model advanced here does not fractionalize the value assigned to children for purposes of income splitting, but rather, it assigns a value of one to each child. There are three reasons for this approach. First, assigning a strict consumption-based value fails to account for the non-monetary costs that children impose on a family. Second, a simple integer value will provide a greater benefit to recipients while making the provision easier for taxpayers to understand and respond accordingly. Third, the family taxable unit requires us to view the family, rather than its individual members, as the primary consumption unit. Requiring assignment of income based solely on predicted consumption of individual members obscures that view. Rather, children's average consumption should be used only as a basis of comparison.

Hypothetically, if a child consumes only half as much as an adult, an economically accurate system would divide the taxable income of a single parent with one child by 1.5. Compare this approach with the one taken by France, where families are credited with half of a share for their first two dependents and with a whole share for each additional dependent.[187] France's quotient reflects a value for the third child that is twice as high as the value given to the first two, demonstrating the country's preference for families with three children or more.

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184. HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 263 (2d ed. 2004).

185. Bittker, *supra* note 174, at 1449.

186. McIntyre & Oldman, *supra* note 173, at 1575.

187. Lari, *supra* note 117, at 239.

The United States, which is politically and fiscally unable to adopt the full panoply of France's family policies, should prize the first and the second child as highly as the third if it hopes to alleviate the financial disincentive to childbirth among women who refrain from having children on account of time and wage pressure. Using children's average consumption as a baseline, and rounding up to the nearest integer for additional family benefit and administrative simplicity, I propose that each dependent within a household be counted as a whole unit or the integer multiple of a whole unit throughout minority for purposes of splitting income among family members. Although this amount exceeds the 0.5 value allotted by France or the 0.6 value suggested by empirical evidence on children's consumption, a greater allotment is desirable in the absence of additional family-friendly policies such as widespread employer-provided childcare or allowances for non-working parents. In other words, while assigning children an income splitting value of one or two, for instance, may be excessive in terms of how their actual consumption spurs pooling, the larger value is justified if the goal of the provision is to assist families rather than to precisely reflect their economic position.

Allocating an integer value to each dependent has an additional advantage. It is administratively simple and, as a result, provides a level of transparency that fractional allocation would not. Transparency seems critical in a law designed to influence behavior. To the extent that income allocation exceeds a dependent's actual percentage of consumption, the additional amount might compensate for post-majority, post-secondary educational support provided by parents who can afford it, and it would give additional financial assistance to those who cannot. That is crucial in an age when many men and women, at the time when they are most likely to make reproductive decisions, are saddled with long-term debt incurred for their own college educations.[188]

3. *Determining Tax Liability*

Once an income splitting value is assigned to children, it makes sense to follow the groundwork laid by France. To determine tax liability, aggregate household income would be divided by the number of earners and dependents in the household. The resulting figure would be used to identify a per-person dollar amount, which would be multiplied by the number of persons in the household to arrive at the household tax. For

188. Adam Hime, *Getting Schooled by the Hybrid-Based Tax: Equity and Efficiency in the Federal Tax Treatment of Debt-Financed Post-Secondary Educational Expenditures*, 77 S. CAL. L. REV. 871, 873 (2004).

example, a two-earner household with three children and total income of $100,000 would consult the rate table to determine the per-person tax amount allocable to $20,000 and would multiply that amount by five persons to determine tax liability.

This system raises interesting, but not insoluble, questions regarding withholding and joint and several liability among family members. To the extent that scholars can derive withholding wisdom from the current joint filing system, policy makers can choose to continue or to alter current practices. Joint and several liability, however, presents a novel issue in this context. Visiting the tax sins of the father upon the son seems politically unpalatable, especially with regard to low- and middle-income families. Regardless, it is conceivable that, in the absence of whole-family joint and several liability, a small subset of individuals who (a) are engaged in high-risk or fraudulent tax activity, (b) are devious, and (c) are parents will view trusts established for the support and maintenance of children as the equivalent of credit-shelter trusts. Because I view the possibility of such transactions as remote, and because nominee and transferee liability theories could prevent them if broadly interpreted, I will not discuss them here.

4. Eliminating Secondary Earner Bias

The income aggregation and splitting mechanism just proposed raises the specter of secondary earner bias to which I previous alluded. Secondary earner bias is a characteristic that the family taxable unit unfortunately shares with joint filing, and it therefore bears discussion. While the joint filing system typically advantages the couple as a whole, it often results in a higher rate of taxation on the secondary earner's wages. The secondary earner is, more often than not, a woman.[189] Accordingly, a number of scholars have called for abolishment of joint filing.[190] For this reason, use of the family as the taxable unit should be elective rather than mandatory. The paragraphs that follow examine gender issues associated with income aggregation and splitting and conclude that although use of the family taxable unit also raises those issues, the detriment is offset by provision of greater freedom to would-be mothers than is afforded by family assistance measures contained in the current Code.

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189. In my opinion, this is changing. Future parity, I predict, will remove the secondary earner penalty from the category of gender concerns into that of questions of overall fairness.

190. Among others, see Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J. L. & POL. 241, 365 (1997); Kornhauser, *supra* note 147, at 108.

In his article, *Federal Income Taxation and the Family*, Professor Bittker famously explained that it is impossible to simultaneously have a progressive rate structure, equal taxation of married couples with equal income, and a marriage-neutral tax burden.[191] Professor Bittker's article concluded that "advocacy of a marriage-neutral tax system collides directly and irretrievably with a dominant theme of tax theory for at least 50 years—the irrelevance of ownership within intimate family groups."[192] He noted that those who challenged the principle of communal ownership within family groups, "together with its implication that taxpaying capacity is best measured by consolidated marital or family income" might "belatedly come to be honored as unsung heroes if today's advocates of a marriage-neutral tax system carry the day."[193]

That prediction has, to some extent, come to pass. As noted above, feminist scholars have urged abolition of the joint return.[194] The reasons are readily observable. Income aggregation and splitting provide obvious benefits for couples where one spouse stays at home, but they provide no benefit to equal-earner couples.[195] As a result, joint returns are "thought to reinforce traditional gender roles in which the husband works and the wife does not."[196] In other words, in marriages where the wife earns less than the husband, income shifting from the husband to the wife through the joint return is undesirable because it forces the wife into a higher tax bracket than she would otherwise occupy.[197] Evidence suggests that this result discourages some women from working.[198] In addition, it imposes joint and several liability on the wife for tax debt that is not attributable to her earnings.[199] Finally, some scholars argue that in spite of the added tax burden born by the wife, the husband continues to control the bulk of his earnings.[200]

These arguments against joint filing, while accurate in some instances, run counter to its original inspiration. The joint return can be

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191. Bittker, *supra* note 174, at 1396.

192. *Id.*

193. *Id.*

194. *See* Christian, *supra* note 190, at 365; Kornhauser, *supra* note 147, at 108.

195. Christian, *supra* note 190, at 248.

196. *Id.* In my opinion, arguments like this one, which assume that women are generally secondary earners, are increasingly dated and serve to reinforce traditional gender roles even more than a tax system the language of which is gender neutral. For the time being, however, I will assume, in the absence of strong empirical evidence to the contrary, that this hard-thought and, for some, genuinely-held feminist position remains temporarily viable.

197. *Id.* at 255–56.

198. *Id.* at 248.

199. *Id.* at 255–56.

200. *Id.*

traced to two Supreme Court cases. In *Lucas v. Earl*, the Court held that couples could not contractually split their income, but that income must be taxed to the person who earned it.[201] In contrast, *Poe v. Seaborn* sanctioned income splitting in community property states based on common ownership established by state law.[202] Responding to the inequitable treatment of similarly situated taxpayers established by these cases, states rushed to establish community property regimes, and Congress instituted the joint return.[203] Joint filing, then, is predicated upon common ownership or use of income earned by partners in marriage. As a result, feminist arguments against joint filing have, at their heart, the idea that one partner in marriage does not contribute to the earning of and does not have a stake in the income of the other. This view, which focuses on individual ownership and use of property, discounts the importance of family consumption and support obligations, which the family taxable unit takes into account.

In other words, income pooling is not dead. The McIntyre-Oldman model, the Bittker model, and the currently proposed model of the family taxable unit, all discussed previously in this Article, are at least partially predicated on income pooling. Over the past decade, scholars have observed that changing demographics, including the meteoric rise of nontraditional families, have called old assumptions about pooling into question.[204] Fewer than ten percent of all people in the United States still live in a nuclear family with a working father and a stay-at-home mother.[205] It is more common today for individuals who are also members of families to secure some measure of financial independence by holding a portion of their assets separately.[206] This is true for both traditional and nontraditional families.[207] Based on these assertions, one study has concluded that Professor Bittker's reliance on marital pooling of resources is now "largely unsupported by empirical evidence."[208] As a result, the study argued that "[t]he joint return ought to be abolished. A system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals."[209]

201. 281 U.S. 111 (1930).
202. 282 U.S. 101 (1930).
203. Kornhauser, *supra* note 147, at 65.
204. *Id.* at 66–67.
205. McCaffery, *supra* note 156, at 985–86.
206. Kornhauser, *supra* note 147, at 78.
207. *Id.*
208. *Id.* at 80.
209. *Id.* at 108.

While it is accurate to say that joint returns subject secondary earners to higher marginal rates, it is not necessarily true that a tax system based on the individual as the taxable unit is "more efficient" or "ultimately better able to accomplish social family goals."[210] The joint return is inefficient when it discourages secondary earners from entering the workforce; however, it does not follow that treating the individual as the taxable unit would be better. In order to make such an assertion, it is first necessary to determine the choice or set of choices for which the effectiveness of the measure is to be assessed. If we assume that workforce participation and childbearing are desirable, use of the family taxable unit may be more desirable because it is able to relieve wage pressure through reduced withholding that is keyed to family size. Additional resources will, in turn, enable two-earner families to relieve time pressure by accessing paid child care and domestic assistance. In single-earner families, the family taxable unit will, in part, compensate for lost wages. Nonetheless, secondary earner bias caused by the joint return is well documented and must be recognized by any proposal that calls for income aggregation, including the family taxable unit.

A proposal to amend the tax system in favor of families must eliminate secondary earner bias. To do so, use of the family taxable unit must be elective within a dual rate table system. Consider two couples with identical aggregate income of $100,000 per year. Assume that there is a single rate table and that each person files individually until the birth of a child. Couple A consists of Husband, who earns $50,000 per year, and Wife, who earns also $50,000 per year. Notice that neither Husband nor Wife is a secondary earner because their incomes are equal. When this couple has their first child, aggregation and income splitting under the family taxable unit will notionally result in three equal shares of $33,333.33. This is a good result for both Husband and Wife because both of their incomes will be taxed at a lower rate.

In contrast, Couple B consists of Husband, who earns $30,000 per year, and Wife, who earns $70,000 per year. Notice that Husband is a secondary earner because his income is substantially less than Wife's income. Like Couple A, when this couple has their first child, mandatory aggregation and income splitting will notionally result in three equal shares of $33,333.33. While this result is good for Wife as the primary earner, it is not good for Husband, who, as the secondary earner, may now be taxed at a higher rate on his income. The same bias results from joint filing under the current system. Consequently, use of the family taxable unit will only benefit Couple B if Wife's tax savings

210. *Id.* at 108.

are greater than Husband's tax loss and the couple agrees on a suitable allocation of the savings. Because the amount of savings and loss will vary with income and with the family rate structure, it is possible that mandatory imposition of family aggregation and income splitting will leave Couple B in a worse position. This result would put pressure on Couple B's labor and childbearing decisions and could lead to choices against preference for both. For this reason, participation in the family rate structure should be elective and separate, fairly calculated rate tables should be established for families and for single filers. Although this structure may result in net revenue loss for the federal government, it maximizes freedom of choice and provides financial assistance while maintaining taxpayers' civic responsibility to bear a portion of the government's cost.

5. *Addressing Progressivity Concerns*

In addition to implicating secondary earner bias, use of the family taxable unit raises concerns about the preservation of progressivity. This is because it applies indiscriminately to all families, not just those with low income. After all, families both rich and poor sacrifice time, opportunities, and resources for their children. And as Professor Alstott has noted, "Economic class is not a reliable metric for the autonomy burden of child rearing, especially for mothers."[211] Inasmuch as children represent a cost in any form to their parents, shouldn't a government interested in maintenance of a stable population extend its chosen benefit to all parents in the hope that the benefit will help those on the margin who want to have children, even if those parents have substantial income?

This, at first blush, excites little sympathy as a redistributive matter. After all, why should taxpayers at large subsidize childbearing and childrearing in families above the poverty line? The answer is that children, in the aggregate, provide obvious externalities in the face certain population aging and potential population decline.[212] Most of the cost of those externalities is borne by parents who must pay for lodging,

211. ALSTOTT, *supra* note 89, at 96.

212. I am not alone in this assertion. Donald Tobin has noted that "[a]t all income levels, investment in children—in education, housing, training, and nutrition—has significant beneficial returns for both the recipients of the investment and society as a whole." Tobin, *supra* note 89, 458. Professor Tobin therefore recommends the creation of "Child Investment Funds" that would provide children under the age of fifteen with a yearly stipend of approximately $2,000. *Id.* at 459. *See also* Rolf George, *Who Should Bear the Cost of Children?*, 1 PUB. AFF. Q. 1, 31 (1987) ("Children grow up and become, among other things, providers of pensions, maintainers of society. . . . Now since they are free agents, escaping thus the control of their investors, they become *res ominia*, benefit everyone.").

food, clothing, education, medical care, and other expenses. When viewed in the abstract, then, unsubsidized childbearing and childrearing represent a redistribution of wealth (in the form of societal returns on human capital, if you will) from larger families to smaller families and single people. As an equitable matter, it makes sense to offset this redistribution in some regard because families and single persons with equivalent income are not similarly situated and therefore have different abilities to pay. This consideration is conceptually separate from the consideration of vertical equity, which is discussed below.

One manner of assessing the equitability of a tax policy is to examine it in two directions: horizontal and vertical. Horizontal equity demands similar taxation of similarly situated taxpayers, and vertical equity demands progressivity.[213] In other words, vertical equity asks whether taxpayers with more resources bear proportionally more of the tax burden than those with fewer resources.[214] At first blush, the family taxable unit appears to contravene both principles. From a purely income-oriented standpoint, horizontal equity requires that two families of equal income be taxed equally. This result is impossible under the family taxable unit unless all families of equal income have an equal number of members, because tax liability varies with the number of people in any given family. However, the family taxable unit can, to an extent, achieve horizontal equity if tax is evaluated with an eye toward family size.

There is no reason to adopt a purely income-oriented view of horizontal equity. If one accepts the premise that, in some sense, tax laws should be predicated upon ability to pay, family size must be taken into account when evaluating equity. It then becomes apparent that a two-earner, one-dependent family earning $100,000 and a two-earner, four-dependent family earning $100,000 are not similarly situated. Consequently, horizontal equity must be evaluated not only on the basis of income but also with regard to the earner/dependent ratio. Using these criteria, and focusing on dollars and cents, the family taxable unit achieves horizontal equity because it taxes families with equal income and equal numbers of dependents equally.

A similar analysis may be undertaken for vertical equity, but it will produce different results. The family taxable unit is not progressive in all circumstances, even among families with the same number of children in a progressive rate structure. Consider the following worst case example. Couple A has total aggregate income of $200,000 and

213. *See* JOINT COMM. ON TAXATION, 99 TH CONG., ANALYSIS OF PROPOSALS RELATING TO COMPREHENSIVE TAX REFORM 3–7 (Comm. Print 1985).

214. *Id.*

Couple B has total aggregate income of $40,000. Assume that the applicable rate schedule taxes an income per family member of less than $20,000 at a rate of 10%. At $20,000 of income, the rate increases to 12.5%, and it increases by 2.5% for each additional $10,000 of income. The rate brackets (with some omissions for brevity) are as follows:

Income/Individual	Tax Rate
$0 – $19,999	10%
$20,000 – $29,999	12.5%
$30,000 – $39,999	15%
$40,000 – $49,999	17.5%
$50,000 – $59,999	20%
$100,000 – $109,999	32.5%

Using the rate structure shown above, the following table compares the hypothetical taxes on Couple A and Couple B as their families grow, assuming that all income is taxed at the highest marginal rate. The table demonstrates that progressivity of the family taxable unit breaks down at low levels of income.

Number of Dependents	Value Name	Couple A: $200,000	Couple B: $40,000
0	Income/Family Member	$100,000	$20,000
	Tax Rate	32.5%	12.5%
	Tax Liability	$65,000	$5,000
2	Income/Family Member	$50,000	$10,000
	Tax Rate	20%	10%
	Tax Liability	$40,000	$4,000
4	Income/Family Member	$33,333	$6,667
	Tax Rate	15%	10%
	Tax Liability	$30,000	$4,000

Although Couple A will always pay more tax than Couple B, the tax itself becomes less progressive as the couples have additional children. Notice that when the couples have no children, the ratio of Couple A's liability to Couple B's liability is 13:1. When the couples have two children, the ratio decreases to 10:1. When they have four children, it reaches 7½:1. Furthermore, although Couple A's savings per additional child decreases more rapidly as a percentage of total income, Couple B's total savings is maximized when they have one child. This is because Couple B reaches the lowest tax bracket more quickly.

The benefit provided by the family taxable unit depends wholly upon an additional dependent lowering the family's overall rate. For families that are already taxed at or close to the lowest rate, this structure provides no benefit at all. Based on the actual rate table for joint filers, I estimate that these families comprised roughly 20% of the total number of families who filed tax returns in 2003; however, I estimate that families in the lowest two brackets comprised over 50% of all such families.[215] Therefore, if the current United States rate structure and income dispersion were maintained, the family taxable unit would be ineffective for almost half of all families.

Regardless, lack of progressivity under the hypothetical rate structure above does not mean that the family taxable unit cannot be part of a progressive system. Progressivity for all but the very lowest-income taxpayers is a function of the rate structure and refundable credits or grants within the system. Instead of retaining the currently wide lower brackets, narrower brackets could be adopted at more frequent intervals for low levels of income. Likewise, wider brackets could be adopted at higher levels to restrict the benefit available to families at high levels of income. In other words, Congress could make it easier for middle income families to reach the next lowest bracket by adding dependents but could make it more difficult for very high income families to do so. Through bracket adjustment, Congress could manage redistribution via the family taxable unit on the basis of two variables: income and fertility. Furthermore, adopting this rate format would not impinge on the population maintenance aspect of the family taxable unit. Presumably, the very rich do not refrain from having a second or third

215. My calculation is based on data available from INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, STATISTICS OF INCOME, INDIVIDUAL COMPLETE REPORT 2003, PUBLICATION 1304, at Table 3.4 (2005), *available at* http://www.irs.treas.gov/pub/irs-soi/03in34tr.xls. Joint filers and heads of household submitted 57,252,816 returns during the year. *Id.* 12,024,810 of them reported income in the lowest bracket, and 23,187,937 of them reported income in the second lowest bracket. *Id.* These data do not distinguish between filers who have children and those who do not, so my calculation is truly a rough estimate.

child on the basis of economic considerations.

6. Addressing Distributional Concerns

Perhaps the most politically potent criticism of the family taxable unit is that it affords little or no assistance to low-income families. It could therefore be viewed cynically as a bid to encourage upper- and middle-income families to overtake low-income families by having many more children per family. Such a policy would, of course, be morally repugnant. Even if it were not, empirical evidence gives us no reason to believe that encouraging growth solely among families with means would produce any beneficial societal result. Furthermore, the fact that the family taxable unit would provide a benefit to one audience—middle- and upper-income families for whom finances may represent a childbearing disincentive—does not preclude the government from providing some other benefit to low-income families. As a result, the idea that the family taxable unit would result in a middle-class baby boom at the expense of low-income taxpayers is misguided.[216]

7. Addressing Environmental and Infrastructure Concerns

Some critics of family friendly tax measures may worry not about a burgeoning middle class but about burgeoning, period. They may argue that an effort to stabilize the United States population level will result in an excessive number of additional children who, through their numerosity, will endanger the environment and strain infrastructure already burdened by an aging population.[217] Data from France, which

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216. Furthermore, economists have found over the past decade that the birthrate among women who receive welfare does not vary according to increases or decreases in welfare benefits. Theodore Joyce, Robert Kaestner & Sanders Korenman, *Welfare Reform and Non-Marital Fertility in the 1990s: Evidence from Birth Records* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. W9406, 2002), *available at* http://nber15.nber.org/papers/w94060 (surveying available literature and concluding that studies of the effect of benefit changes on birthrate have proven inconclusive); *see generally* Melissa Schettini Kearney, *Is There an Effect of Incremental Welfare Benefits on Fertility Behavior? A Look at the Family Cap*, 39 J. HUM. RESOURCES 295 (2004) (demonstrating that vital statistics data reveal no decline in birthrate in response to family benefit caps). It is logical to conclude, based on these findings, that even if the family taxable unit were structured to include a refundable credit, it would have no effect on the fertility of the lowest income families. Such families, who traditionally have a higher birthrate than the remainder of the population, simply may not view their relative lack of means as a disincentive to childbearing. As a result, it makes little sense to extend to these families the removal of a disincentive that they do not perceive as such when they might be better aided by assistance in another form, such as school choice vouchers. It bears repeating that I am not arguing that low-income families would not benefit from added financial assistance. I am simply stating that added financial assistance is unlikely to increase the birth rate among these families.

217. *See* Gary S. Becker, *Missing Children*, WALL ST. J., Sept. 1, 2006, at A14 (stating that those

has adopted more drastically liberal policies than the one suggested here, indicate that the family taxable unit, standing alone or in combination with other measures, will not cause a population boom but will merely slow population decline.[218] Furthermore, the provision is self-limiting. The benefit decreases as a percentage of income with each additional child, and once a family has reached the lowest tax bracket, splitting income among additional children will have no effect. As a consequence, the provision is not likely to encourage limitless visits from the stork. Also, it should be noted that additional children will someday become adults whose aggregate net benefit to society will likely outweigh the extra cost, if any, that their upbringing imposes on mature taxpayers. In other words, the family taxable unit should pay for itself, even if it results in the highly unlikely need for additional infrastructure.

VII. THE FRENCH EXAMPLE

As a partial response to the various criticisms presented above, the following paragraphs describe tax treatment of families in France. The country has always been a trendsetter in family policy, and it provides a useful illustration of how the family taxable unit might function in practice in combination with other measures.[219] Unlike the United States and its European neighbors, France did not seek to restore the place of women to the home after World War II.[220] Neither did it dissuade them from returning home.[221] It was the first country to offer paid maternity leave, and it has been on the forefront of providing

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concerned about environmental pressure resulting from increased population have overlooked the fact that younger, denser populations are more innovative and therefore less likely, as a result of better technology, to stress the environment).

218. LONGMAN, *supra* note 5, at 30.

219. France has a fascinating history of pro-natalism that extends back to the early twentieth century. *See* Marie-Monique Huss, *Pronatalism in the Inter-War Period in France*, 25 J. CONTEMP. HIST. 39 (1990). As a political movement during the period between the first and second world wars, pro-natalism appealed to supporters of national defense, family-centered groups and moralistic groups. *Id.* at 40. The idealogy enjoyed wide popularity, and many of the social programs that began during its heyday serve as the foundation for France's current and generous system of family support. *See generally id.* The idea was so well-accepted that the post-Vichy government devoted twenty-two percent of the country's GNP to redistribution in favor of families. *Id.* at 64. *See also* Rachel Henneck, Family Policy in the US, Japan, Germany, Italy and France: Parental Leave, Child Benefits/Family Allowances, Child Care, Marriage/Cohabitation, and Divorce 9 (May 2003), *available at* http://www.contemporaryfamilies.org/subtemplate.php?t=briefingPapers&ext=InternationalFamilyPolicy.

220. *Id.*

221. *Id.*

universal childcare outside of the home.[222] It is, perhaps, some measure of the country's reproductive success that it has attempted to disentangle a woman's choice to have children from her choice to have a career. While the two choices can, practically speaking, never be mutually exclusive, they are much less intertwined in France than in countries where family benefits are available only to specified classes of mothers, such as low-income women or women whose income enables them to presently purchase childcare now in exchange for future tax relief.

Although France's benefits are extensive and would likely be frowned upon in the United States as the beginning of a "nanny state," they are an example of how the family taxable unit might work in tandem with other measures that are beyond the scope of this Article. The French allowances and incentives can be divided into three categories: those that compensate for time pressure, those that compensate for wage pressure, and use of the family unit as the taxable unit.

1. Allowances to Compensate for Time Pressure

France first introduced paid maternity leave in 1913.[223] Since then, the government has expanded its scope, and unlike many other countries, France has mandatory job-protected, paid leave for parents following birth of a child.[224] Following maternity leave, children are entitled to full-day child care, and all French children are enrolled in preschool activities at ages three and four.[225] Parents of limited means are charged for these services on a sliding scale based on ability to pay.[226] Parents are also entitled to a tax credit equal to 25% of the costs of outside child care up to €575 per child for as many as six children.[227] In addition, France offers a tax credit equal to 50% of the amount paid for au pair and housecleaning services up to €5,000.[228] Finally, if a parent chooses not to return to work following parental leave and the birth of a child, he or she may collect the Allocation Parentale d'Education, discussed below.

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222. *Id.*

223. *Id.* at 9.

224. *Id.* at 10. Women take six weeks of leave before and ten weeks of leave after the births of their first two children. *Id.* They take eight weeks of leave before and eighteen weeks of leave after the birth of their third child. *Id.*

225. *Id.*

226. *Id.*

227. AULT & ARNOLD, *supra* note 184, at 219.

228. *Id.*

2. Allowances to Compensate for Wage Pressure

The Allocation Parentale d'Education grants one of a newborn's parents a monthly benefit payment of approximately €500 for three years following the child's birth, but only if the receiving parent has held a job for two of the five years prior to birth and does not work more than one-fifth of his or her normal hours while receiving the credit.[229] The benefit was initially offered only to families with three or more children, but in 1994, it was extended to families upon the birth of their second child.[230] In addition, France offers a means-tested family allowance to families with at least two children. This allowance is available to families whose income does not exceed 55% of the minimum wage.[231] The obvious advantage of the Allocation Parentale is that it allows earners to respond to time pressure by alleviating wage pressure.

3. Family Taxable Unit

France provides an interesting example of how the family taxable unit might work as part of a package of measures designed to stabilize the population level. The family taxable unit was instituted in France just after WWII to account for the effect of each family member's consumption on the family's bottom line.[232] The unit is called the "foyer fiscal," and it consists of a husband and wife (or unmarried partners who are bound by a civil pact and who have lived together for at least three years) as well as dependent children and qualified disabled persons who live in the same household.[233] Under this system, the incomes of all of the members of the household are aggregated, and

229. Guy Laroque & Bernard Salanie, *Fertility and Financial Incentives in France* (Ctr. for Research in Econ. and Statistics, Working Paper No. 2003–32, 2003), *available at* http://www.crest.fr/pageperso/lma/laroque/fec3e.pdf; Reinstadler et al., *supra* note 82, at 551.

230. Reinstadler et al., *supra* note 82, at 551.

231. *Id.* at 516.

232. AULT & ARNOLD, *supra* note 184, at 263. France has a fascinating history of pro-natalism that extends back to the early twentieth century. *See* Huss, *supra* note 219.

233. *Id.* The *pact de civil solidarite* joins unmarried partners of any sex. *Id.* Enacted in 1999, the pact allows couples to determine their own property relations by contract, and couples are treated as partners for social security purposes. Henneck, *supra* note 219, at 11. In my opinion, this arrangement benefits society by rendering at least one aspect of the system of taxation marriage-neutral, something that should be considered in the United States as a compromise between supporters and opponents of gay marriage. The idea is a good one because it permits the federal government to administer laws on a non-prejudicial basis while leaving moral questions to the states. On a pure policy level, if adoption of the household as the taxable unit is predicated upon a correlation between increased consumption and increased household size, marital status should not play a role in determining the amount of tax owed by a household.

income tax is then determined according to the "quotient familial."[234] To calculate the quotient familial, each spouse or civil partner is given a value of one share.[235] The household is given an addition half share for the first two dependents, and a full share for any additional dependents.[236] A household with a mother, father and two children, for example, would have a quotient familial of three.[237] If the family decided to have another child, its quotient familial would increase to four.[238] Single parents receive an additional half share if they are the primary caregiver of at least one child.[239] Finally, when two unmarried parents who are not joined by civil pact share responsibility for a child, each parent is entitled to only half of the child's share.[240]

In order to determine income tax, a family's aggregate income is divided by its quotient familial.[241] That product is compared to the rate structure, which will contain four brackets ranging from 5.5% to 40% in 2007.[242] The resulting tax is multiplied by the number of shares attributed to the family.[243] An identical rate structure applies to single persons and to families.[244] Finally, tax savings generated by dependents are limited by a ceiling, which was enacted to address concerns that the quotient familial nullified progressivity at high income levels.[245]

It is worth mentioning at this point that France's income tax, despite its high rate, accounts for only a quarter of all French tax revenue.[246] The value-added tax generates a lion's share of the country's revenue.[247] The country also imposes flat taxes on income that use the individual as the taxable unit rather than the family.[248] The combined rate of these taxes in 2004 was 8% of income.[249] Because the United States relies mainly upon the income tax to generate revenue, whereas France relies

234. AULT & ARNOLD, *supra* note 184, at 263.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Lawrence J. Speer, *France Will Accelerate Income Tax Reductions Plannedfor End of 2007*, Daily Tax Rep.,(BNA) No. 182, at G3 (Sept. 20, 2006).

243. AULT & ARNOLD, *supra* note 184, at 263.

244. Lari, *supra* note 117, at 231.

245. *Id.* at 237.

246. AULT & ARNOLD, *supra* note 184, at 41 (noting that total tax revenues equal roughly 45% of France's GDP and that income tax revenues equal roughly 11% of the GDP).

247. Lari, *supra* note 117, at 231.

248. *Id.* at 231.

249. AULT & ARNOLD, *supra* note 184, at 40.

on supplementary taxes, a switch to the family taxable unit could be perceived as a greater immediate fiscal threat in the United States. A full exploration of the issue is beyond the scope of this Article; nevertheless, as explained above, the United States rate structures applicable to the family taxable unit would have to be considered carefully prior to adoption.

Have France's policies helped it maintain a stable population? Although no study has isolated the cause of France's robust population, the country boasts one of the strongest birthrates in Europe. While its neighbors face the threat of population decline, France's total fertility rate remains close to the replacement rate.[250] In 2006, it was 2.0 children per woman.[251] And the country's good showing cannot be attributed to immigration. According to Michael Charpin, the director of the National Institute for Statistics and Economic Studies, the fertility of France's immigrant population is only slightly higher than that of the native-born population.[252] Cultural factors undoubtedly play a role in France's childbearing success, but it is highly unlikely that the country's birthrate is not influenced by its family-forward policies. After all, close neighbors Italy and Germany are both struggling to maintain stable populations while France enjoys relative calm.

VIII. CONCLUSION

In *Blueprints for Basic Tax Reform*, Professor David Bradford recognized the dynamic nature of the family as an economic unit and its integral role in questions of taxation.[253] He wrote that sharing of consumption and resources within families justified use of the family as "the unit of comparison."[254] He also wrote that familial differences are "relevant to that comparison of lifetime situation by which relative tax burdens are to be assigned to different individuals. The practical consequence of this will be that the tax liability of a father, for example, will depend in part upon consideration of the situation of the whole family."[255]

This statement is as true today as it was in 1977, when *Blueprints* was first published. The difference is that in 1977, although global fertility

250. WATTENBERG, *supra* note 1, at 210. Some, but not all of its success is due to the continued fertility of the second and third generation of the descendents of immigrants.

251. Pierre Yves-Roger, *In France, a Modest Rebound for Babies*, CHI. TRIB., Jan. 17, 2007, at §1, 10.

252. *Id.*

253. U.S. DEP'T OF THE TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 26 (1977).

254. *Id.*

255. *Id.*

was firmly in the middle of a four-decade long decline, fear of overpopulation was widespread.[256] Today, the concern is different. Europe, Asia, and Australia are faced with depopulation, not overpopulation.[257] In order to maintain a stable population level in the United States, the government should consider measures that would aid families who want an additional child but who feel constrained by time pressure, wage pressure, or both. The family taxable unit is one such measure, and its adoption would bring conceptual coherence to the Internal Revenue Code. The Code already contains a number of provisions that treat the family as an economic unit. Taxpayers are nonetheless barred from aggregating and splitting income with anyone other than a spouse. Including children in the equation is not a departure from established policy—it is merely a logical extension and continuation of Congress's existing recognition of the family's shared economic experience.

In addition to consistently expressing recognition of families' financial interdependence, the family taxable unit does not incentivize women to consider non-preference choices in market labor and child care. The benefit is neutral with regard to the workplace participation of secondary earners. It neither encourages nor discourages them from entering the workforce. And in contrast to current tax breaks for the purchase of childcare, adoption of the family taxable unit would not implicitly express a governmental preference for working mothers. This benefit neutrality is important because it prevents further stigmatization of housework and leaves women free to choose the level of labor market participation that most closely matches their preferences.

In addition to expressing a preference for working mothers, current childcare benefits also express a preference for certain kinds of care. In contrast, the family taxable unit does not. By providing an uncordoned benefit, the family taxable unit would aid families whose childcare preferences fall outside of Congress's prescription, thereby allowing them greater autonomy. The benefit therefore allows families to maximize their utility, something that a tailored credit or deduction could not accomplish in every instance.[258] Whereas a two-earner family might need additional funds to pay for childcare, a family with a stay-at-home mom who has college education loans might desperately need additional funds to pay for a fence or a safer car. The family taxable

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256. Nicholas Eberstadt, *Population, Resources, and the Quest to "Stabilize Human Population": Myths and Realities*, *in* GLOBAL WARMING AND OTHER ECO-MYTHS 61, 62–63 (Ronald Bailey ed., 2002).

257. WATTENBERG, *supra* note 1, at 137.

258. Whether they would do so or not is, of course, a separate question.

unit helps both families. As they choose to grow, and as the economy grows, the benefit provided by the family taxable unit grows with them.

Finally, France's experience with the family taxable unit demonstrates that it will not, as some predict, result in an infrastructure-busting, environment-ravaging baby boom. Instead, it may provide a needed boost for families who desire, and are on the cusp of affording, an additional child. Because it could tender such needed aid while bringing holistic coherence and more freedom of choice to our current system of family taxation, it is time that we gave the family taxable unit a second look.